

Review of the Navigation Act 1912
FINAL REPORT

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EXECUTIVE SUMMARY

Key Findings and Recommendations

1. The review has identified a range of safety and environmental hazards that arise in shipping operations. Given the high level of dependence of Australian trade on shipping services, and the size of its trading task, Australia has a relatively high level of exposure to safety and environmental risks. Competitive shipping services should and can be provided within an operating and regulatory framework that reduces the risks to safety and the environment.
2. The role of governments in regulating safety and environment protection is well understood and accepted. It is appropriate for the government to adopt a precautionary approach in the management of the industry's safety and environmental performance, using internationally agreed standards as an appropriate benchmark. The fact that costs will be incurred in meeting internationally agreed regulations for shipping are generally recognised and accepted as warranted.
3. There are several provisions in the legislation that address employment arrangements for seafarers that would more appropriately be addressed under modern company based employment arrangements governed by modern industrial relations legislation. In some cases, industrial and safety considerations have been intermingled. It is appropriate that these be separated to establish a clear focus on essential health and safety requirements in law, whilst enabling employers and employees greater freedom to negotiate on industrial matters.
4. Work at sea, however, presents some unique circumstances and it is appropriate that shipping law continue to provide for conditions that reflect safe operations and reflect particular industry characteristics.
5. The Act also encompasses a range of provisions that stem from long-standing arrangements in international shipping. These arrangements were adopted to avoid unnecessary delays to ships and increased costs of international trade. These concepts are well ingrained in international shipping law and practice, and it would be inconsistent and inefficient for Australia to adopt different procedures.
6. Regulation based on internationally agreed standards and measures is an appropriate approach to address the problems identified by the review. There is widespread support for Australia to continue to base its regulations on the regime developed by the International Maritime Organization, supplemented as appropriate by the work of the International Labour Organization. The *Navigation Act 1912* essentially achieves this, although there are some areas where Australian interpretation of international rules exceed international norms. The outcome of implementing internationally agreed standards and measures should be the even-handed treatment of Australian and foreign ships.
7. In some instances, it is justifiable that particular Australian standards are applied, for example where no international standard exists or where the Australian community would expect standards to be in excess of internationally agreed

measures. To the extent that Australia considers higher standards to be necessary, it should promote them for adoption by the relevant international bodies.

8. The review proposes a major change in focus of the regulation towards adoption of performance based standards. A performance based approach represents international best practice. It allows for improved safety outcomes by providing more incentive and commitment among all persons affecting the safe operation of a ship. It also provides business with greater flexibility to find solutions tailored to their own operating requirements where these can be demonstrated to achieve the required safety outcomes. The scope for adoption of a performance based approach, however, needs to remain consistent with developments in international regulations, much of which remains prescriptive in nature.
9. The extent of changes proposed by the review supports the development of new shipping legislation rather than amendment of the *Navigation Act 1912*. The proposed directions should be adopted as quickly as possible to realise a more competitive and efficient industry, whilst ensuring a commitment to enhanced safety and environmental protection outcomes. However, a number of substantial issues remain to be resolved with the industry, the States and the Northern Territory to ensure that adequate regulatory coverage is maintained and workable solutions are implemented.

Nature of the Review

10. In response to the report of the National Competition Policy Review Committee, the Commonwealth agreed to review by the year 2000 all legislation that may restrict competition. The *Navigation Act 1912*, other than Part VI concerning the coastal trade, is listed on the Commonwealth Legislation Review Schedule for review to be completed in 1999-2000. A guiding principle of legislation reviews is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition.
11. The terms of reference (see [Appendix A.1](#)) require the review to:
 - a. identify the nature and magnitude of safety, environmental, economic, and social issues that the *Navigation Act 1912* seeks to address;
 - b. clarify the objectives of the Act and their appropriateness;
 - c. identify the nature of any restrictions on competition;
 - d. identify any alternatives to regulation, including non-legislative approaches;
 - e. analyse and as far as possible quantify the costs and benefits and overall impacts of the Act and alternative approaches;
 - f. identify groups likely to be affected and their views; and
 - g. make recommendations on preferred options.

A. Issue Identification

12. As an island nation, Australia's national well being depends to a large extent on access to competitive, efficient and effective shipping, which carries over 99% of our international merchandise trade. Significantly, the transocean transport task is dominated by export of bulk commodities that must compete in highly

competitive, globalised markets. The reliability and costs of trans-ocean transport have a direct bearing on the health of Australia's major commodity exports, and by extension on the Australian economy and standards of living.

13. The world shipping industry operates in one of the most open markets, with relatively few barriers to entry and exit. There is intense competition among international shipping companies in most market sectors, with strong downward pressures on rates.
14. While these competitive pressures benefit shippers through lower freight prices, they also encourage ship owners and operators to seek cost minimisation wherever possible. With most capital, insurance and fuel costs being relatively fixed, the greatest pressures to reduce costs occur in the operational areas of crewing and maintenance. As a result there has been a global trend in the industry towards use of second and open registers, which offer access to lower crew and ship registration costs, as well as advantageous taxation regimes. As well, there has been a noticeable ageing of the world fleet in some market sectors. Moreover, the continuing trend towards larger ships, which offer productivity benefits, also represents a greater potential risk to the marine environment of larger pollution incidents, as well as raising concerns about fatigue among smaller crews.
15. Accidents and incidents involving shipping have the potential to incur significant loss of life and property, and damage to the marine environment from pollution. Not only has the volume of shipping increased over the years, but also ships now are significantly bigger and carry a wider range of hazardous and noxious cargoes. The consequences and costs of incidents frequently fall on third parties or the general community, and are not adequately reflected in commercial arrangements between shipping companies and shippers.
16. International accident rate data and Australian incident investigation and Port State control reports reveal a continuing unacceptable level of defects in ships and errors of seamanship in the global shipping industry. There are around 1000 serious casualties annually in world shipping. There have been a significant number of ship losses worldwide over the past ten years, involving a considerable loss of human life and damage to the environment. For example, over 800 passengers and crew died in the 1994 loss of the ro-ro passenger ferry *Estonia* in the Baltic Sea. The foundering of the tanker *Erika* in 1999 off the coast of France involved initial pollution clean up costs of US\$150 million and has impacted extensively on tourism, fisheries, aquaculture and salt production industries, as well as the environment. Bulk vessels, which carry a significant part of Australian cargoes, can be susceptible to structural integrity problems because of the nature of their working life, in part due to age and stresses during loading and unloading. A spate of total losses from massive structural failures of bulk vessels between 1989-91 involved the loss of 314 lives, of which 118 were from ships carrying Australian cargoes.
17. International shipping can involve many interests from different companies and countries. It is not unusual to find a ship is owned, financed, operated, crewed, insured, certified and registered in separate countries. Cargo interests may similarly be widely dispersed. Disputes over delays, loss of or damage to vessels,

cargo and/or third parties can be time consuming and expensive to resolve, particularly if a vessel or cargo is detained while disputes are resolved through lengthy court procedures. It is in the interests of international trade facilitation that internationally recognised and accepted procedures are adopted to resolve such disputes, as well as for necessary government regulation of shipping activities.

18. Market failures may also occur where there is an unequal distribution of information or bargaining power between parties. In the past this was evident in the relationships between ship owners and crews, where crews were largely engaged on a casual basis for single voyages and were subject to extensive control over their lives by the ship's master. Government intervention was considered necessary to protect seafarers.
19. With the adoption of company based employment in the Australian shipping industry since 1998, and the evolution of community wide industrial and social security legislation since the Act was last reviewed in 1976, there is now a lesser need for government intervention in employer-employee relationships through shipping legislation. Shipping regulation should not continue to encompass matters that are best left to industrial agreements consistent with community wide industrial legislation. Nevertheless, work at sea involves some specific characteristics that are not readily addressed in general community wide legislation. There is a need to consider retention in shipping law of some specific measures to provide for appropriate protection for seafarers.

B. Specification of the Desired Objective

20. The *Navigation Act 1912* presently does not have a stated objective. A clear statement of the objective of legislation is fundamental to sound program management and delivery of effective outcomes. The Act presently encompasses a range of subjects, reflecting its origins and development as an omnibus piece of legislation covering the Commonwealth's responsibilities for shipping regulation.
21. The review recommends that the objectives of the legislation should be to:
 - Enhance ship safety and protection of the marine environment;
 - Facilitate international shipping trade; and
 - Provide for conditions for seafarers consistent with safe operations and reflecting particular industry characteristics.
22. These objectives encompass the range of market failure issues identified above.

C. Restrictions on Competition in the Act

23. The *Navigation Act 1912* and its subordinate Marine Orders regulate a wide range of matters dealing with employment in the shipping industry, the construction, equipment and operation of ships, carriage of cargoes and passengers, and salvage and liability claims.
24. The legislation and regulations which are the subject of the review (i.e. excluding Part VI of the Act) may be considered to impose the following types of restrictions on competition:

(a) Licensing standards to participate in the industry.

The Act requires all persons wishing to act as a ship's master, crew or a pilot to be properly qualified. Certification conditions specify the nature of skills, experience and fitness required. These requirements restrict entry into the industry of persons not meeting the specified conditions. All persons meeting the required standards are eligible for granting of a certificate and the legislation does not discriminate on grounds other than competency and fitness for duty.

(b) Certification standards for ships and equipment

All ships are required to meet a minimum level of standards for construction, equipment, safe manning and maintenance. In the main, statutory requirements align with those prescribed in international maritime conventions, although in a few instances standards reflect particular Australian requirements. These standards restrict the ability of an owner or operator of a ship of lesser standards to participate in the industry.

Where Australian standards differ from international standards, competition may be restricted by the additional costs facing Australian operators who wish to trade internationally, due to the need to comply with several differing standards.

Additional costs may also arise where shipping regulation duplicates or contradicts other Commonwealth or State/Territory regulations. Prescriptive standards may also inhibit the adoption of innovative solutions where regulation has not kept pace with the introduction of new technologies, or where standards designed for one industry sector are applied across all sectors, which may have different characteristics or needs.

(c) Employment conditions for crews aboard Australian ships

The legislation prescribes a range of matters regulating the employment of seafarers, in some instances reflecting the nature of industry-wide industrial agreements, as well as international convention requirements. Prescription of such matters on an industry-wide basis reduces the ability of individual enterprises to negotiate employment arrangements that would more appropriately suit individual operating circumstances and market sectors. Regulations may also limit the ability of ship owners and operators to acquire alternative, more internationally competitive equipment, such as new ships, which do not comply with Australian employment-related regulations.

(d) Accreditation of certification authorities

The legislation provides for inspection and issuing of ships' certificates of survey by government appointed surveyors or accredited classification societies. Some certification activities may also be undertaken by overseas administrations. The regulations also provide for accreditation of seafarer training institutions and issuing of seafarer certificates. The scope for use of external agencies for these purposes provides for efficiencies to be realised from competition, however,

those agencies that do not meet accreditation standards will be excluded from the market.

(e) Prescription of maximum fines and penalties

There are a large number of offences in the legislation attracting substantial penalties for breaches. Penalties may be of such an amount that they deter or restrict participation in the shipping market.

25. The legislation is, in the main, intended to promote public safety, protection of the environment and to provide for “fair trading” among industry participants, rather than to confer economic advantage on particular industry participants. Regulation of occupational and ship certification and of minimum conditions for seafarers is premised on the need to protect the community and those in a disadvantaged bargaining position from incompetent or unscrupulous practitioners.
26. It has been argued that the legislation confers an unfair competitive advantage on foreign ships that do not observe the same standards. It should be noted, however, that the regulations also provide for inspection and detention or prosecution of foreign ships that do not meet minimum agreed international standards while visiting Australian ports.
27. There have been arguments that some foreign ship registers do not apply the same standards as Australia and, as a result, competitors of Australian trade gain a competitive advantage from use of such shipping, including from those that do not trade into Australian ports. The inconsistent application of internationally agreed standards around the world has an impact on the competitiveness of Australian exporters, particularly for low value bulk commodities such as iron ore. However, this arises not from Australia’s legislation, but from the lack of enforcement of minimum standards elsewhere. Better application of internationally agreed measures throughout the neighbouring region and the world is a more appropriate approach than reducing Australia’s standards. Non-application of internationally agreed standards is a problem facing the shipping industry, not the solution.

D. Identification of Options

28. The review has considered a number of options for meeting the desired objectives:
 1. No regulation: Under this option, Australia would have no regulation of ship safety and related matters. Adoption of this approach would imply that ships of any standard could come into and operate in Australian waters, regardless of consequences. Suppliers of shipping services would be left to determine their own standards of behaviour. Persons or businesses adversely affected by this behaviour would seek redress directly or through the courts.
 2. Industry self-regulation: Industry could be left to develop and administer its own codes of practice based around the issues covered in the existing legislation. Successful self-regulation depends on factors such as the size and structure of an industry, the ease of entry and exit, ease of containing

externality effects and coverage of the industry by reputable organisations. It also depends on the level of acceptance internationally where industry parties are trading outside their national jurisdiction.

3. Quasi-regulation or Co-regulation: Under this option governments influence industry to comply with a range of rules, standards and other instruments, but these do not form the basis of explicit government regulation. These might include government endorsed industry codes of practice, guidance notes, government-industry agreements and national accreditation schemes. Co-regulation usually refers to industry developed and administered arrangements, backed by government legislation enabling the arrangements to be enforced. Both quasi- and co-regulation require a coherent industry body and acceptance by all industry participants of some mutual obligation to comply.
4. Unilateral national regulation: Australia could develop its own set of regulatory standards for the shipping industry, sufficient to meet particular Australian concerns. Regulations could be tailored to Australian circumstances, which may reduce or increase barriers to competition or costs of compliance according to particular issues.
5. National legislation based on international agreements: This option reflects the existing contents of the *Navigation Act 1912*, which largely give effect to Australia's international maritime convention commitments. Within this option, however, scope exists for formulating regulations in a variety of ways, from the highly prescriptive form currently used to a performance and outcomes based approach. Regulation using performance based, "duty of care" concepts also may encompass elements of quasi- or co-regulation where appropriate, but essentially it provides for a legally enforceable approach to ensure persons engaged in the shipping industry meet their obligations.

E. Assessment of Impact of Options

29. The review has concluded that the broad direction of the *Navigation Act 1912* is a valid approach to the problems addressed by the legislation. Alternatives to government regulation are considered to be impractical, as recognition, implementation and acceptance of alternative regimes are not sufficient to achieve the desired safety and environmental outcomes in the international shipping industry. The international community has rejected non-regulation and self-regulation in shipping and has put in place a regulatory system based on international treaties. As part of the international community, the Australian shipping industry has indicated its support for a regulatory system based on internationally agreed regulations.
30. Unilateral national regulation is rejected, as it would not necessarily achieve better outcomes than the existing approach based on multi-lateral instruments, and potentially could increase compliance costs for businesses and individuals engaged in the shipping industry. Australia's ability to influence international shipping standards, as a large user of shipping services, is enhanced by its record

of implementing and enforcing international agreements that encourage desirable safety and environmental outcomes. The imposition of unilateral regulation that is not acceptable to a highly mobile international industry has significant consequences for Australia's international trade.

31. The international nature of the shipping industry suggests that an international approach must be taken towards its regulation if safety and pollution prevention measures are to be successfully implemented. In Australia, the historically small Australian –owned fleet means a heavy reliance on foreign shipping services to meet our trading needs. With foreign ships carrying more than 95% by volume of our exports and imports, the emphasis in modern shipping regulation must remain on application of internationally agreed standards to these ships, as well as to the Australian fleet.
32. The principal basis for development of an appropriate international regime is the International Maritime Organization (IMO), supplemented as appropriate by the work of the International Labour Organisation (ILO) in areas of crew health and safety. While much of this regulation is highly prescriptive, most international conventions provide for equivalent, alternative solutions as approved by national administrations. In recent years the IMO has recognised the need to focus more on the human factors that contribute to safety and pollution prevention. Formal Safety Assessment techniques have been identified as a more effective method of rule making than traditional prescriptive methods.
33. An approach based on safety assessment techniques recognises that different sectors of the industry will have different operational characteristics, and that safety solutions are best targeted towards the individual operations of a company, within the broad framework of internationally agreed obligations and responsibilities.
34. The Act also needs updating to remove provisions that duplicate or contradict general laws on workplace relations or cover matters now part of the social welfare system. The aim is to treat the shipping industry as far as possible as other industries governed by the common workplace relations legislative regime and to remove provisions from the Act that are redundant in light of modern administrative and legal practice. Matters that are not directly related to the prime objective of ship safety and marine environment protection should be repealed or relocated in more appropriate legislation. However, there are provisions that do not conveniently belong in any other legislation and it is proposed that these be retained in a separate Part of the legislation that replaces the Act.
35. Rationalisation of official reporting requirements and reducing paperwork requirements of shipping regulation offers substantial opportunity for reducing the costs of compliance for business. Official reporting requirements are to be examined jointly by AMSA and the industry, as part of the review of Marine Orders, to assess scope for further reductions or aggregations of reporting requirements, opportunities for reporting in common formats and for using available electronic technologies for transmitting the required information to authorities. The objective is to ensure that to the maximum extent possible, the

burden of reporting is kept to the minimum necessary consistent with international convention obligations and the purposes of the legislation.

Costs and Benefits of Regulation

36. There are significant difficulties in quantifying the costs and benefits of any restrictions on competition in the legislation, particularly in matters of safety and environmental protection where estimates will vary considerably according to predictions of risk and the values ascribed to loss or impairment of life and damage to the environment. While regulatory requirements clearly impose real costs on the industry and the regulators, it is not clear to what extent individual businesses would have incurred similar costs voluntarily. It is reasonable to infer from the evidence of continuing deficiencies in shipping standards that at least a proportion of shipping businesses would elect not to incur such costs in the absence of regulation.
37. Similarly, the benefits to the community are not directly evident or readily quantifiable, but they are substantial and need to be considered. Benefits will depend on whether, in the absence of regulatory requirements, any market failure would occur. Market failures do occur in many areas of economic activity, and there is considerable historical and contemporary evidence that they will continue to do so in the shipping industry. The costs to individual seafarers and the community as a whole of even a single incident can be so severe as to outweigh the costs to industry or individuals of meeting regulatory requirements.
38. Notwithstanding the difficulties in estimating costs, the OECD has estimated that the minimum application of internationally agreed safety standards imposes a cost burden of around 15% of ship operating costs. This is equivalent to around US\$210,000 per vessel per annum and totals around US\$4 billion per year on a world trading fleet of about 19,000 vessels. A UK industry estimate places the costs of minimum standards to annual ship ownership (including capital costs) at around 5%. Based on findings that ship operating costs are about 35% of total annual costs, the UK estimate is of the same order as the OECD estimate. These estimates would total around A\$20 million per annum for the major trading vessels in the Australian fleet. An additional total of A\$20 million per annum could be incurred for vessels in the offshore and minor trading fleet, if similar orders of costs applied to such vessels.
39. The costs of administering safety and other regulations under the *Navigation Act 1912* are reflected in the levies charged to the shipping industry by AMSA to perform these functions. In 1998-99, the Regulatory Functions Levy amounted to A\$16.1 million.
40. Additional compliance costs to business may arise where Australian standards exceed or differ from those prescribed internationally, or where unnecessary duplication exists across or within Commonwealth and State/Territory jurisdictions. Apart from a few anecdotal examples, the review has not been able to separate or quantify the extent of such costs. Other intangible or unquantifiable costs may arise from lost opportunities to participate in the shipping industry by persons or businesses who do not meet the prescribed standards. There are also

legal fees, fines and other costs associated with ship detentions or prosecutions for breaches of regulations, although these are not additional to compliance costs, as they represent the costs of non-compliance.

41. Benefits of regulation include:

- Safety of individuals, through reductions in risk of death or injury to crew, passengers or third parties, savings in search and rescue expenses and savings in medical, hospital and rehabilitation costs;
- Protection of property, through reduced loss and damage to vessels, cargoes, public infrastructure and third party property;
- Reduced delays to vessels, cargoes and passengers and other maritime infrastructure users;
- Environmental benefits from savings in pollution damage to marine life and other marine ecological resources;
- Reduced public administration costs from habitat remediation and clean-up costs, reduced needs for mitigation equipment and response expenditure;
- Reduced losses to recreational and other community amenity;
- Reduced losses to other industries such as tourism, fisheries, aquaculture and others dependent on marine resources;
- Enhanced commercial reputation of shipping and related businesses and of individuals engaged in shipping.

42. These benefits are extremely difficult to quantify. Some examples serve to illustrate the potential scale of benefits of regulation:

- The number of injuries to Australian seafarers has fallen steadily since 1994, with estimated savings in compensation and rehabilitation costs of A\$3 million;
- The OECD estimated the total loss of a fully laden bulk ore carrier with crew could impose economic costs in excess of A\$60 million. On this basis, losses of bulk carriers carrying Australian cargoes in the period 1989-91 potentially represented A\$546 million per year;
- Ship detentions have fallen from 9.6% of ships inspected in 1995 to 5.3% in 1999, or from 244 vessels to 145, saving in delays to ships and cargoes. Delay costs for ship owners or charterers due to detention in 1999 are estimated to be around A\$2.5 million.
- The 1999 *Erika* oil pollution incident reportedly has imposed remediation costs around US\$150 million. The costs of a pollution incident could be many times greater if it occurred in an area of high environmental sensitivity and economic value, such as the Great Barrier Reef.

Alternative Approaches

43. Adoption of a performance based approach is consistent with trends in other areas of international and domestic safety regulation and represents a recommended “best practice” approach. When all parties involved in shipping operations, including shore based management and personnel, adopt a safety culture, it can be expected that accidents and incidents should reduce. This will benefit shipping and cargo interests directly, including financiers, insurers, owners and operators. Crews will also benefit from reduced risks of death or injury. The general

community benefits from reduced risks of loss or damage to life, property and the environment.

44. The adoption within Australian shipping law of performance based regulation underpinned by guidelines and codes of practice, referring to relevant international and national standards, should provide sufficient flexibility for businesses to meet their obligations in a way that suits their individual operations and minimises compliance costs. It also provides the flexibility and incentive to encourage innovation and improve safety and environmental performance.
45. Performance based regulation is not without its costs, however. Industry may be required to work harder at identifying and implementing measures to address safety and environmental hazards. In some cases this will require more effort and costs for businesses in developing appropriate procedural arrangements, investment in equipment and training of staff. While larger companies and those engaged in development of new technologies in the shipping industry will have the skills and resources to address these requirements, smaller companies may prefer to use standard guidelines that save them the costs of developing their own approaches. Regulations should continue to provide guidance to assist smaller operators to meet their obligations under performance based standards.

F. Consultation

46. The review has consulted widely with stakeholders, through written submissions, in industry workshops and meetings with interested parties.
47. Stakeholders generally have strongly supported the continuing need for regulation of the principal matters covered by the *Navigation Act 1912*, particularly the proposal to continue regulation of safety and environmental protection based on multilateral agreements and standards for shipping. Crew competency is regarded as a key safety issue. In the absence of the necessary commitment by the international shipping industry and a number of Flag States, stakeholders also overwhelmingly endorsed the continuing need for a strong port state control regime for Australia to address standards of foreign shipping in Australian waters.
48. Major industry organisations and individual shipping companies have supported the adoption of a performance-based approach to replace the currently prescriptive arrangements. Consultations, however, identified a desire to stage the introduction of performance based regulation and a concern that some matters, such as seafarer qualifications, require more prescription than other matters. These concerns will be addressed through the established and on-going consultation arrangements for the review of Marine Orders.
49. The shipping industry also has supported separation of industrial from safety matters, allowing industrial arrangements to be negotiated at the enterprise level. Industry has supported retention of shipping specific features in shipping law where these matters should apply to industry as a whole, such as duty of care to a seafarer in distress.

50. The Maritime Union of Australia (MUA) submitted that it accepted that terms and conditions of employment for Australian seafarers generally could be set and protected by agreements with employers, despite reservations expressed about the adequacy of the *Workplace Relations Act 1996*. The union also supported retention in shipping law of key areas of competence, conduct, accommodation and other matters related to international maritime conventions, as these are seen to be related to the health and safety of seafarers. However, the MUA indicated its opposition to Australia maintaining only minimum international convention requirements, and recommended that where practicable Australia should exceed those standards, particularly in areas of environmental protection and crew welfare. The union emphasised the social aspects of shipboard life, which it argued warrant special attention in shipping law. The union supported modernisation of the Act, but not a move towards a less prescriptive emphasis in the pursuit of flexibility.
51. The review proposes adoption in the legislation of specific international conventions that protect seafarers where these matters are unique to shipping. The review also has recommended that, where appropriate, Australian standards should exceed international standards if these are considered to make a significant contribution towards safety and environment protection, and that any such Australian standards should be promoted for adoption internationally. The review has proposed a form of performance based regulation that promotes a safety culture in the industry by emphasising the responsibilities and duties of all parties engaged in shipping operations. It would include an expanded range of audit and enforcement options for the Australian Maritime Safety Authority. This approach is consistent with concepts in contemporary occupational health and safety legislation, as well as trends internationally and in other industries. The review has specifically recommended against self-regulation.
52. The Australian Institute of Marine and Power Engineers and the MUA expressed a strong interest in participating in the review of Marine Orders, with particular interest in crew qualifications, accommodation, medical fitness and other matters relating to seafarer health and safety. The maritime unions already are included in AMSA's established consultative process that allows relevant stakeholders to comment on changes before new or amended Marine Orders are promulgated.
53. Concern has been expressed by seafarer welfare agencies and the MUA that more needs to be done to protect the interests of seafarers aboard foreign ships operating in Australian waters. They have pointed to instances of substandard working conditions, not only in matters of safe working conditions, accommodation and food, but also in areas of inadequate employment agreements, pay and physical abuse or intimidation.
54. The review has endorsed a continuing role for AMSA in regulating the working conditions of foreign seafarers to the extent that they affect the safe operation of a ship and the health and safety of the crew. However, where aspects of working conditions do not affect safety or health, the Steering Group sought the views of the Minister, who confirmed that it is his view that it is not appropriate for the *Navigation Act 1912*, and the legislation that replaces the Act, to provide for intervention in such matters. Other remedies are available in Australian law.

55. The offshore petroleum industry endorsed the coverage in shipping law of ships engaged in the offshore exploration and extraction industry. These include support craft, seismic vessels, mobile drilling units, tankers servicing offshore installations and Floating Production, Storage and Offloading (FPSO) facilities when operating as ships. FPSO facilities, however, spend a large proportion of their time in stationary operational mode as petroleum installations, when they are subject to the *Petroleum (Submerged Lands) Act 1967*.
56. The offshore petroleum sector submitted that restrictions on competition arise from duplicated coverage of FPSOs in operational mode by the *Navigation Act 1912* and the *Petroleum (Submerged Lands) Act 1967*. The industry expressed a preference for operators of these facilities to meet their safety obligations, consistent with international maritime conventions, under one piece of legislation, the *Petroleum (Submerged Lands) Act 1967*, when they are in operational mode, which may include temporary disconnects from the seabed riser. The review has not endorsed this proposal on the grounds that such facilities have characteristics inherent in ships and operate in a marine environment. As a consequence it is appropriate that such facilities are regulated by a body competent in marine matters, such as AMSA.
57. An independent audit conducted as part of a concurrent review of the offshore petroleum safety case regime found that present regulatory arrangements under the *Petroleum (Submerged Lands) Act 1967* are not equipped or sufficiently resourced to undertake a comprehensive role in regulating the offshore sector's safety. In these circumstances it would be unwise to add the maritime operations of offshore petroleum facilities to the DISR portfolio's responsibilities.
58. In addition, FPSO facilities are regulated by the IMO maritime safety regime, and it is appropriate that they continue to be regulated under maritime legislation. The review has recommended, however, that the industry work with AMSA and petroleum industry regulators to gather international support for a specific IMO convention for offshore petroleum facilities, which would more appropriately address safety issues in this sector. The review also notes that the proposed adoption of a performance based approach to safety regulation, and continuing improvements in coordination of audit and inspection functions between AMSA and the petroleum safety regulators has potential to reduce unnecessary duplication of compliance costs for the industry.

G. Recommended Option

59. The review recommends that Australia continue to regulate shipping safety and environment protection based on internationally agreed standards. Within this framework, however, there is scope to improve the flexibility of regulation, both to cater for individual business circumstances and solutions and to achieve better outcomes by emphasising the responsibilities of all parties for addressing safety and environmental concerns in their actions and decision making. The review recommends that the regulations be recast to adopt a performance and outcomes based approach, within the limitations of international convention obligations which contain many prescriptive elements.

60. The review also recommends that a number of redundant elements in the legislation be repealed, including the role of the receiver of wrecks, provisions dealing with shipowners exemption from liability, deserters from foreign ships, disciplinary offences by crew that do not affect the safe operation of a ship, and management of livestock. Where shipping law regulates employment relationships, the review considers that these matters should be repealed wherever they can be adequately covered by general community wide legislation or where shipping law provisions are clearly inconsistent with modern industrial legislation.
61. Shipping legislation should continue to provide for conditions for seafarers where specific shipping industry characteristics cannot be readily addressed under community wide industrial or social security legislation. The review has identified a number of areas where this regulation should continue. These include such matters as ensuring appropriate evidence of employment agreements, that crews have access to advice from authorities or industrial representatives, and that employers recognise their duty of care towards employees in distress and to account for the belongings of employees who die in service.

Implementation and Review

62. The review is proposing significant changes in the method of implementing the desired policy outcomes and the scope of the legislation. In a number of areas, reforms will require more detailed discussions with industry, Commonwealth agencies and the States and Territories to ensure that unintended consequences or gaps in regulatory coverage do not arise. Other matters that are redundant or inconsistent with other legislation could be repealed quickly.
63. This suggests that modern regulation that reflects the contemporary characteristics of world and Australian shipping, and modern approaches to regulation, will require new legislation, rather than amendment of the existing *Navigation Act 1912*. The review is proposing that a staged approach be taken, with progressive repeal of the *Navigation Act 1912* as new legislation is drafted addressing the major issues identified in the report. The intent is to have the earliest possible implementation of the recommended approach.
64. The effectiveness of new legislation should be monitored through consideration of flag state inspections, ship defects and detention rates in AMSA's annual port state control reports, supplemented by on-going analysis of the causes of marine incidents and accidents by the MIIU and of deaths and injuries to seafarers in AMSA's reports under the *Occupational Health and Safety (Marine Industry) Act 1993*.
65. The review recommends that a stocktake of the effectiveness of the changes in regulatory approach be conducted jointly by AMSA and the Department of Transport and Regional Services five years after commencement of the replacement legislation. This period is consistent with experience in other industries and jurisdictions of the time taken by industry and administrators to implement and evaluate initial experiences with performance based legislation.

RECOMMENDATIONS

THE NEED FOR AND IMPACT OF REGULATION

Chapter 4 Maritime Regulatory Framework (page 42)

1. Australia should continue to base its regulation of shipping and port state control on international agreements.
2. Commonwealth shipping legislation should continue to support the Australian Transport Council's decision to redefine Commonwealth and State/Territory authorities' jurisdiction over trading ships based on tonnage rather than area of operation.

Chapter 5 Objectives of the legislation (page 48)

3. The principal objectives of the legislation should be to:
 - (a) enhance ship safety and protection of the marine environment;
 - (b) facilitate international shipping trade;
 - (c) provide conditions for seafarers consistent with safe operations and that reflect particular industry characteristics.
4. The Act should not include an objective for economic regulation of coastal shipping.

Chapter 6 General Policy Principles (page 52)

5. The legislation should be underpinned by the general principles:
 - (a) Continued emphasis on consistency with internationally recognised regulations through Flag State responsibilities and strong Port State controls;
 - (b) Greater emphasis on the human factors and individual responsibilities for building a culture of safety and environmental awareness in shipping operations;
 - (c) Greater emphasis on performance based standards with more flexibility for businesses to define their own strategies to meet safety outcomes;
 - (d) Avoiding distortions in the shipping market through regulation;
 - (e) Treating shipping in the same way as other businesses to the maximum extent possible for employment and commercial matters;
 - (f) Making specific provision for a small range of employment; and commercial matters that reflect the particular circumstances of shipping.
6. Australia should continue to retain regulatory standards in Marine Orders that reflect Australian community expectations where these make a significant contribution to safety or marine environmental protection. Where appropriate, Australia also should promote higher standards at IMO for international adoption.

Chapter 7 Structure of the Legislation (page 60)

7. The primary legislation should focus on establishing the purpose of the legislation, prescribing the principles and performance outcomes required and significant duties, offences and penalties. Provision should be made to continue subordinate legislation to establish the detailed requirements and interpretation of the legislation.
8. The primary legislation should be performance based to encourage the development of a safety culture within the shipping industry and to provide flexibility to businesses in meeting their obligations.
9. The effectiveness of the proposed directions should be monitored through consideration of flag state inspections, ship deficiencies and detention rates in AMSA's annual Port State control reports, supplemented by on-going analysis of the causes of marine incidents and accidents by the Marine Incident Investigation Unit and of deaths and injuries to seafarers in AMSA's reports under the *Occupational Health and Safety (Maritime Industry) Act 1993*.
10. A stocktake of the effectiveness of the changes in regulatory approach should be conducted jointly by AMSA and the Department of Transport and Regional Services five years after amendments have been implemented.
11. The legislation should be reorganised into specific parts defined by the core purpose of enhancing ship safety and marine environment protection.
12. Matters that are specific to shipping should be retained in the legislation; however, the legislation cannot be a consolidated compendium of all shipping regulation.
13. The legislation should be drafted in Plain English and make use of appropriate aids to interpretation such as diagrams or explanatory boxes.

Chapter 8 Regulations and Marine Orders (page 65)

14. The legislation should continue to make provision for the Governor-General to make regulations in relation to penalties and incident investigations and for the AMSA to make Marine Orders on other matters.
15. The primary legislation should deal with the broad principles and desired outcomes, and other significant matters such as fees, and major offences or penalties.
16. Marine Orders should continue to deal with the detailed technical requirements of the legislation, including implementation of obligations under various international conventions and maritime safety in general.
17. Relevant codes of practice, standards or guidelines produced by the IMO, the National Marine Safety Committee or other national standard setting bodies should be incorporated by reference into Marine Orders.

18. AMSA and the relevant industry associations should continue the review of Marine Orders in line with the review's proposed performance based regulatory framework so they are consistent with the primary legislation.
19. Marine Orders should continue to include the prescriptive elements of international conventions that are mandatory, but should be framed to allow flexibility within their exemption and equivalence provisions as provided for in the conventions.

Chapter 9 Jurisdiction (page 72)

20. Shipping legislation should continue to support Australia's strong adherence to Flag State responsibilities and an active Port State Control program consistent with international obligations.
21. Australia should make full use of its authority under international law to regulate safety and marine environment protection in relation to vessels operating in or transiting the territorial sea and Exclusive Economic Zone which currently are not subject to Australia's Port State Control regime. The Department of Transport and Regional Services should explore further with the Attorney-General's Department whether there are any additional legislative avenues for extending shipping legislation to fill existing gaps in coverage of shipping operations in Australian waters.
22. Australia should seek international support to amend the provisions of UNCLOS and relevant international conventions that would enable a Coastal State to take appropriate action to protect its marine environment by ensuring all shipping within its claimed jurisdiction complies with agreed international standards.
23. The Department of Transport and Regional Services should consult with the States and Northern Territory through the Australian Transport Council on the need to bring non-trading vessels over 500GT within the Commonwealth's jurisdiction for vessel safety regulation.
24. The Department of Transport and Regional Services should consult with the Department of Employment, Workplace Relations and Small Business and the industry about the longer term need to continue separate occupational health and safety legislation for the maritime industry.

SAFETY & ENVIRONMENT PROTECTION

Chapter 10 Safety and Environment Protection Regulation (page 78)

25. The legislation should apply relevant parts of international maritime safety conventions by direct reference to the conventions, and make provision for regulations to give effect to conventions, amendments and resolutions associated with the conventions.
26. The legislation should continue to prohibit the taking to sea of an unseaworthy ship, and require all owners, operators and masters to ensure that a ship is seaworthy in all respects for its intended voyage.

27. The concept of “seaworthiness” should include the conditions on board that affect the safety and health of the crew.
28. A seaworthy ship should comply with relevant international conventions as listed in the Act.
29. The legislation should explicitly apply the ISM Code requirements of SOLAS as Australian law and point to the duties of ship owners and operators to develop safety management systems consistent with the Code.
30. Shipping legislation should continue to provide for consistency and harmonisation of standards with the States and Territories for both convention and non-convention sized vessels under the Uniform Shipping Laws Code or the proposed National Standard for Commercial Vessels.
31. Commonwealth shipping legislation should continue to provide for the Minister to gazette revisions to the Uniform Shipping Laws Code and/or any other standard, code or guidance material as determined by the Australian Transport Council.

Chapter 11 Crews and Qualifications (page 90)

32. The legislation should continue to provide for application of relevant international conventions concerning the qualifications of seafarers, minimum age for work at sea, medical fitness, medical care, provisions and minimum manning and fatigue management for safety and marine environment protection. These conventions would include:
 - (a) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1995
 - (b) International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F), 1995
 - (c) ILO Convention No. 58 Minimum Age (Sea) (Revised), 1936,
 - (d) ILO Convention No. 73 Medical Examination (Seafarers), 1946, and
 - (e) International Convention for the Safety of Life at Sea (SOLAS), 1974 in relation to medical fitness and minimum manning requirements for safety and marine environment protection.
33. The legislation should continue to include the power to make regulations and Marine Orders in respect of all aspects of the qualifications of seafarers and conditions to be satisfied for employment at sea including minimum age, medical fitness, and consumption of alcohol and drugs. A minimum age of sixteen years is warranted in light of Australian community expectations for children in full-time work.
34. The current limits on alcohol consumption in the *Navigation Act 1912* should be subject to early review by AMSA in consultation with the industry and regularly reviewed in future to ensure that they are consistent with trends in other jurisdictions and industries.
35. The Discipline provisions in Division 12 of Part II of the *Navigation Act 1912* should be repealed. The provisions in this Division dealing with acts by the

ship's crew tending to endanger the ship or life should be revised to reflect the ISM Code requirement that the master should have overriding authority over all persons on board a ship with respect to safety and environment protection. Provision should also be made for penalties against persons engaging in acts that endanger the ship, life or the environment.

Chapter 12 Ship Operations (page 95)

36. The legislation should clearly indicate that the person in charge of a ship has responsibility for the safe navigation of the vessel at all times, including when under pilotage or subject to vessel traffic control measures. It should require the person in charge of the ship to navigate and operate the ship in a safe and responsible manner in all circumstances.
37. The legislation should continue to enable regulations to be made concerning adoption of the COLREGS convention and for other matters relating to safe navigation of a ship.
38. The legislation should continue to provide for regulations to be made and for offences concerning provision of navigation equipment, distress signals and personnel qualified to operate the equipment.
39. The person in charge of a ship should continue to be required by legislation to assist persons in distress at sea.
40. The legislation should continue to provide for all ships to have charts and navigational equipment suitable for their intended voyage and for officers involved with navigation to have access to the charts. Revisions to SOLAS concerning adoption of electronic charting technologies should be encompassed within the revised *Navigation Act 1912*. These provisions should be grouped with other safety-related matters.
41. Section 258(5), requiring assessors with nautical experience at court hearings, and 258A, concerning navigation near ice, should be repealed.

Chapter 13 Coastal Pilotage (page 101)

42. The current requirements for licensing of pilots should be retained in the revised Act and grouped with other safety related matters.
43. Offences in relation to use of drugs and alcohol while a pilot is on board a ship and performing pilot duties should be retained.
44. AMSA should have full responsibility for declaring areas where pilotage or other vessel traffic management or special navigation or reporting measures are compulsory and for making exemptions from these requirements under the legislation, including within the Great Barrier Reef Marine Park region.
45. Pending amendment of the *Navigation Act 1912*, AMSA should be delegated power under the *Great Barrier Reef Marine Park Act 1975* to issue exemptions from compulsory pilotage in the Great Barrier Reef Marine Park region.

Chapter 14 Ship Survey and Certification (page 112)

46. The legislation should continue to provide that all ships covered by the revised Act should comply with the SOLAS, MARPOL, Tonnage and Load Lines Conventions and ILO Conventions Nos. 92 and 133, Accommodation of Crews, or, if non-convention ships, with the relevant regulations under the Uniform Shipping Laws Code or the proposed National Standard for Commercial Vessels.
47. The legislation should impose a duty on persons designing, building, manufacturing, repairing, certifying and owning ships and ship's safety equipment to ensure that they act in accordance with its requirements.
48. Accommodation standards should be included in the requirements of the legislation for ship design, construction and maintenance.
49. AMSA should continue to have power to issue relevant certificates and to authorise survey authorities to issue Australian certificates.
50. The legislation should continue to include the power to make regulations in relation to ship survey, certification and inspection, and for the certification of ship's construction and equipment aspects of the MARPOL Convention.
51. The legislation should continue to provide for tonnage measurement and certification of convention and non-convention size ships.
52. The legislation should retain AMSA's powers to direct ships that are believed not to be constructed in accordance with MARPOL and these provisions should be grouped with AMSA's other inspection and detention powers.
53. The legislation should adopt the provisions of the Torremolinos Convention to provide for safety regulation of fishing vessels coming within Commonwealth jurisdiction.

Chapter 15 Cargo (page 118)

54. The legislation should continue to provide for application of relevant international conventions for cargo handling and stowage, including the Load Lines Convention, the Containers Convention and the IMDG Code.
55. The legislation should continue to prohibit overloading of a ship and provide for inspection and detention of an overloaded ship and penalties on the owner and master.
56. AMSA should continue to have power to issue load line certificates on behalf of other countries and to authorise approved survey authorities to issue Australian certificates.
57. The overloading provisions in Division 1 should be grouped with the Load Lines provisions in Division 5 of Part IV of the *Navigation Act 1912* to assist interpretation of the legislation.

58. The legislation should continue to include the power to make regulations in respect of cargo and loading of ships consistent with the safe and environmentally responsible operation of shipping and the requirements of international conventions. This should include a power for AMSA to require a cargo operation that is deemed to be hazardous to stop until the hazardous situation is rectified or rendered safe.
59. Animal welfare matters should be removed from the Marine Orders and instead be covered by the Export Control (Animal) Orders and the *Australian Meat and Livestock Industry Act 1997*.

Chapter 16 Incident Investigation (page 123)

60. The legislation should continue to provide for investigation of marine casualties and incidents separately from regulatory safety functions.
61. The Navigation (Marine Casualty) Regulations should be amended to require every incident investigation report to contain recommendations aimed at enhancing safety and to prevent recurrence of the same type of incident.
62. The Navigation (Marine Casualty) Regulations should be amended to allow the Inspector of Marine Accidents to investigate incidents on behalf of other Flag States, consistent with IMO Resolution 849(20).
63. The Marine Incident Investigation Unit should continue to consult with the States and Northern Territory marine accident investigation authorities to ensure that Commonwealth and State/Territory legislation provides for appropriate coverage of marine incident investigations by each jurisdiction.

Chapter 17 Wreck Removal (page 127)

64. The legislation should continue to provide for AMSA to have the powers to order removal of both historic and ordinary wreck in Australian waters or to undertake removal itself.
65. AMSA's power to order or undertake removal of both ordinary and historical wreck should be limited to promotion of the legislation's safety and environmental protection purpose.
66. The legislation should continue to place responsibility for costs of removal on the owner of the wreck. Where the owner cannot be identified or is unable or unwilling to remove the wreck, AMSA should be empowered to sell the wreck to recover its expenses, as well as having the right to pursue the owner for any outstanding amount. Alternatively there should be provision for any surplus from sale of removed wreck to be paid to the owner and for the Commonwealth to appropriate the funds if the owner cannot be found.
67. An owner or person finding a wreck should be required to report its location and any potential hazards to AMSA.
68. The owner should be responsible for costs of marking a hazardous wreck if it is not removed.

69. Wreck removal provisions should be regrouped with other safety-related matters in the restructured Act.

Chapter 18 Offshore Industry Vessels (page 134)

70. The revised *Navigation Act 1912* should continue to apply to ships in the offshore industry, including FPSOs when operating as ships, but there should be improved integration with the regulatory system under the *Petroleum (Submerged Lands) Act 1967* when coverage coincides with the *Navigation Act 1912*.
71. The Department of Transport and Regional Services and AMSA should continue to work with the Department of Industry, Science and Resources and the offshore industry to review and streamline the legal and administrative arrangements for safety management in the offshore sector. There should be better coordination between the audit and compliance functions of both regulatory systems to reduce or eliminate duplication of compliance costs.
72. The Department of Industry, Science and Resources should recognise an offshore vessel's compliance with the ISM code as part of the safety case under the *Petroleum (Submerged Lands) Act 1967*.
73. The Department of Industry, Science and Resources should ensure better integration of support craft into offshore petroleum installations' safety case, particularly involving crews on offshore support vessels in development of the safety case.
74. The offshore industry should join with AMSA in promoting within the IMO adoption of a regulatory regime for FPSO's that is more compatible with their shipping requirements.
75. Unregulated ships in the offshore petroleum industry should be brought under the revised *Navigation Act 1912* wherever possible:
- (a) The Department of Transport and Regional Services should explore with the Attorney-General's Department additional legal means for bringing unregulated ships in the offshore industry under the revised *Navigation Act 1912*.
 - (b) Australia should also pursue appropriate amendments to international agreements to obtain the necessary authority to appropriately regulate such vessels, which are operating in Australian waters.
 - (c) Additionally, the Department of Industry, Science and Resources should examine making a condition of an offshore operator's licence under the *Petroleum (Submerged Lands) Act 1967* that vessels contracted by a licensee should comply with the ISM Code regardless of their tonnage. AMSA should be responsible for auditing compliance with the ISM Code.

CREW CONDITIONS

Chapter 19 Australian Crews (page 143)

76. The legislation should repeal as far as possible regulation of employment arrangements that are no longer relevant, could be covered by community wide employment legislation or are inconsistent with modern workplace relations legislation, including
- (a) Section 2, allowing for appointment of superintendents, and amend remaining provisions for functions of superintendents to be carried out by AMSA;
 - (b) Sections 83(1)(d) and 140, concerning assignment of seafarers' salvage rights in agreements, section 148, concerning court powers to rescind agreements, and section 387A, prohibiting incitement to breach agreements;
 - (c) Section 145, prohibiting a person from being on board without permission;
 - (d) Section 148, providing for a court to rescind a contract;
 - (e) Sections 161 to 162, concerning reimbursement from a seafarer's wages of relief provided to a family.
77. The legislation should continue to provide for seafarer employment conditions where these reflect safe operations or particular shipping industry characteristics. These provisions should be framed in terms of the duties of ship owners and employers, including:
- (a) Duty not to take a ship to sea without an agreement in place between the employer and employees.
 - (b) Duty of employer and master to permit a seafarer to go ashore to pursue a complaint or to seek advice, and duty of a crew member not to do so for frivolous reasons.
 - (c) Exemption of a seafarer from the obligation to do jury service.
 - (d) An employer's duty to account for the belongings of a deceased seafarer and for disposal of the body and effects as reasonably required by next of kin. Repeal existing provisions in sections 149 to 160, dealing with property of deceased seafarer.
 - (e) Duty of employer and ship owner not to wrongfully leave an employee behind and to assist an employee left behind overseas to return to his home port and to provide for wages and maintenance in the course of his return.

Chapter 20 Foreign Seafarers (page 147)

78. All current matters in Part III of the *Navigation Act 1912* concerning foreign seafarers and section 10 in Part II, concerning the return of a seafarer to his ship who has been imprisoned for summary offences, should be repealed.
79. The *Migration Act 1958* should be amended to provide for recovery from the owner, agent or master of the ship of costs of removing a foreign seafarer and to provide for delivery to his ship before it departs Australia by immigration officers of a foreign seafarer imprisoned for summary offences.

80. Ship safety and marine environmental protection aspects of foreign seafarers working conditions should be addressed through all ships' ISM safety management systems and should be audited for compliance through Port State control inspection programs.
81. AMSA should continue to have powers under the legislation, consistent with its safety and marine environment protection mandate, to also make judgements about foreign crew working conditions where these raise safety or environmental issues.
82. Humanitarian concerns about other crew welfare matters, such as non-payment of wages or physical abuse, for foreign seafarers, should continue to be addressed under other civil or criminal legislation.

COMMERCIAL MATTERS

Chapter 21 Passengers (page 149)

83. The provisions in Part V, sections 272 to 276 and 282 relating to contractual matters between ship operators and passengers should be retained.
84. The powers of the master and crew under sections 278 to 281 to control passenger behaviour for safety reasons should be retained and grouped with other safety matters, and passengers included in "duty of care" principles.
85. The provision of additional powers to prevent entry of communicable diseases by passengers on foreign flag cruise ships should be addressed under quarantine or health legislation rather than the *Navigation Act 1912*.

Chapter 22 Wreck (page 152)

86. All provisions of Part VII, Division 2 concerning treatment of wreck, except section 314A, should be progressively repealed.
 - (a) Sections 296 to 301 should be repealed immediately
 - (b) Sections 302 to 314 should be repealed once suitable alternative arrangements have been agreed with the States and Territories to address these matters.

Chapter 23 Salvage (page 158)

87. The legislation should continue to provide for salvage claims to be heard in relation to all ships where claims are brought in Australia, except as provided otherwise in section 316.
88. The legislation should not be applied to historic wrecks declared under Commonwealth and State or Territory legislation.
89. The obligation imposed under section 317A to render assistance to persons in distress should be combined with similar provisions under section 265, and regrouped under the general duties of persons involved with shipping. The obligation should extend to all ships in Australian waters and all Australian ships wherever they may be.

90. The legislation should continue to apply the provisions of the Salvage Convention, as provided in section 315.
91. The legislation should include a time limit on claims for life salvage, by requiring all such claims to be made through or in conjunction with claims for salvage of property, and by prohibiting a claim for life salvage to be made after a claim for property salvage has been finalised.
92. The legislation should continue to provide for salvage claims to be made by or against the Crown on the same basis as if they were by or against a private person, as provided in sections 329B and 329C.
93. The exemption provided in section 329B to claims against the Commonwealth and Australia Post for salvage of articles in the course of post should be repealed and a similar provision enacted in the *Australian Postal Corporation Act 1989* if it needs to be retained for postal purposes.
94. The prohibition on a seafarer trading salvage rights in an agreement of employment (sections 83(1)(d) and 140) should be repealed.

Chapter 24 Liability (page 163)

95. The legislation should retain provisions in sections 259 to 263 reflecting established maritime law for the division of loss, damages for personal injuries, the right of contribution and abolition of the statutory presumption of fault. However, these provisions should be transferred to a separate part of the Act.
96. Section 338, providing for shipowners to limit liability for loss or damage to goods in certain circumstances, should be repealed and replaced by separate legislation regulating compensation for passengers and their luggage.
97. The legislation should retain the shipowner's and master's liability for damages caused by a ship under pilotage, as well as sanctions against a pilot's licence if he is found negligent or incompetent.

ADMINISTRATION

Chapter 25 Administration (page 166)

98. Section 101, concerning smuggling by a crew member, should be repealed and these matters left subject to the *Customs Act 1901* and general company employment arrangements.
99. Section 104(1), dealing with the treatment of stowaways, should be repealed. Stowaways who are not Australian citizens coming into Australia should be dealt with under the *Migration Act 1958*. Other stowaways should be treated as non-fare paying passengers.
100. The Migration Regulations should be amended to provide that it is a defence against prosecution for a master to rescue a person at sea in accordance with international obligations.

101. Section 410 requiring a master to keep a copy of the *Navigation Act 1912* aboard a ship should be repealed.

Chapter 26 Reporting Requirements (page 169)

102. The Official Log should be retained, but all official reporting requirements should be grouped together under the general duties of persons aboard a ship.
103. The reporting requirements should be further examined by AMSA and industry to identify additional matters that can be rationalised into a common form and to allow use of available technologies to consolidate and transmit to the appropriate authorities.
104. Requirements to report on employment related matters that are no longer relevant under company based employment should be repealed.

Chapter 27 Compliance and Enforcement (page 179)

105. The legislation should continue to provide for the appointment of inspectors and for powers of inspectors to:
- (a) undertake audits of a company's safety management systems;
 - (b) stop, board, inspect and search a ship;
 - (c) muster the crew and ask questions; and
 - (d) require production of all relevant documentation and certificates.
106. Provisions for regulating the manner of performance of duties by an inspector should be included in the legislation, consistent with Commonwealth criminal law policy and including relevant procedures for search and entry to premises and identification of authorised officers.
107. AMSA should continue to be enabled to delegate enforcement and inspection powers to other bodies as appropriate.
108. The legislation should provide for AMSA to:
- (a) issue defect notices or infringement notices for minor offences or deficiencies;
 - (b) issue summary penalty notices for clear and undisputed offences;
 - (c) accept binding undertakings from individuals and organisations;
 - (d) order detention of a ship until deficiencies that adversely affect the seaworthiness of a ship are redressed, including where certificates are not all present and valid;
 - (e) order a ship to proceed to a port, or not enter a port or specified waters, or to comply with specified requirements while in or near a port or specified waters, where AMSA has reason to believe a ship is not compliant with the regulations and it is necessary or expedient to ensure safety or to protect the environment;
 - (f) undertake investigations, reviews and reports where AMSA has reason to believe that conditions aboard a ship may result in weakening of the ship's safety management system; and
 - (g) revoke, alter or suspend crew or ship certificates.

109. Ship and company management should be held liable for fines or imprisonment where a ship is unseaworthy or loss of life or serious personal injury are a direct consequence of management failing to take responsibility for safety.
110. Other penalties should apply to the person who can be proven to have had the requisite level of fault, including on-shore management and agents.
111. Where appropriate, there should be provision for monetary penalties to continue for every day that the offence continues.
112. Offences and penalties in the legislation should be rationalised and the amounts of penalties and equivalent terms of imprisonment should be revised consistent with the Criminal Code and the *Crimes Act 1914*. Penalties for individuals and bodies corporate should be separately specified and appropriate provision made for external review of decisions.
113. The legislation should continue to provide for efficient legal proceedings and administrative review of relevant decisions consistent with government guidelines for external review.

1. INTRODUCTION

The Commonwealth Legislation Review Program

1.1 In 1995 the Council of Australian Governments (COAG) endorsed a package of reforms which would substantially implement the recommendations of the Report of the Independent Committee of Inquiry into National Competition Policy (the Hilmer Committee)¹.

1.2 An important element of the package was the commitment by Commonwealth, State and Territory governments to review by the year 2000 all existing legislation that may restrict competition. The Treasurer announced the Commonwealth Legislation Review Schedule on 28 June 1996². The *Navigation Act 1912* is listed on the Schedule for completion in 1999-2000.

1.3 The Legislation Review Schedule initially provided for review of Part VI of the Act, regulating the coastal trade, in line with the Government's stated policy to wind back and remove cabotage arrangements. In the event, options to wind back cabotage were outlined in the report of the Shipping Reform Group³, provided to the Government in 1997. Subsequently, new guidelines, to streamline the licence and permit system under Part VI of the Act for vessels engaged in interstate coastal trade, were approved on 24 June 1998. The broader issue of economic reform of shipping was further considered in the context of the report of the Shipping Reform Working Group⁴, provided to the Government in May 1999.

1.4 Accordingly, a comprehensive review of other parts of the Act was substituted on the Legislation Review Schedule. This followed the Government's decision on 16 December 1997 to review the Act in two stages. The first stage considered repeal of matters that impede shipping reform or are inconsistent with the concept of company employment. This review stage was completed in 1998 and resulted in the Navigation Amendment (Employment of Seafarers) Bill 1998, which was introduced into Parliament on 25 June 1998.⁵

1.5 This report addresses the second stage review, which examines the remaining parts of the Act in accordance with the terms of reference at [Appendix A.1](#). The terms of reference were developed from a template provided by the Office of Regulation Review.

1.6 A guiding principle for legislation reviews is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh

¹ Hilmer F, Raynor M, and Taperell G (1993)

² Treasurer (1996)

³ Shipping Reform Group (1997)

⁴ Shipping Reform Working Group (1999)

⁵ On 8 March 2000 the Senate proposed significant amendments to the Bill. The Government has not yet indicated its response to the proposed amendments. This report has been prepared on the basis that the Government does not intend this stage of the review of the Act to address the issues covered by the Bill and the Senate's proposed amendments.

the costs and the objectives of legislation can only be achieved by restricting competition.

The Navigation Act 1912

1.7 The *Navigation Act 1912* is an “Act relating to navigation and shipping”. It provides the legislative basis for many of the Commonwealth’s responsibilities for maritime matters including ship safety, the coasting trade, employment of seafarers and shipboard aspects of the protection of the marine environment. It also regulates wrecks and salvage operations, passengers, tonnage measurement of ships and a range of administrative measures relating to ships and seafarers.

1.8 The Act presently applies to trading ships engaged in interstate and overseas voyages, although the Australian Transport Council⁶ has agreed to amend jurisdiction from a voyage to a vessel tonnage basis from 1 January 2001. The Act authorises the Australian Maritime Safety Authority to make subordinate legislation, known as Marine Orders, containing standards and operational procedures which give effect to international convention requirements, as well as to relevant Australian standards, and to carry out inspections of vessels.

The Nature of Shipping

1.9 In considering issues in the review, the review team has been mindful of the origins of the Act and the principal purposes it was intended to achieve. The Act arose from 19th century British legislation, which sought to address the then high losses of ships and lives and exploitative working arrangements for seafarers. A brief history of the Act’s development is contained in [Appendix A.3](#).

1.10 The seafaring industry has inherent risks due to its operating environment. The sea is an often unpredictable, dangerous and unforgiving element. Ships operating on international voyages can be a long distance and many days away from assistance. Ships operating in coastal regions must navigate through a range of hazardous regions, in all kinds of weather conditions and at times in crowded traffic. The range and quantities of hazardous and noxious cargoes carried on ships has been increasing year by year. Accidents and incidents involving ships have the potential to incur significant loss of life and property, as well as damage to the marine environment.

1.11 Crews must live and work together in close proximity for extended periods of time. Unlike most employees in other industries, many seafarers live in their work environment and may be separated from families and other support services for long periods. As the 1998 Ship Safe report⁷ noted “a ship is not just a means of transport and a workplace. It is also a social system.”

1.12 Changes in technology and community expectations of reasonable living and working conditions have undoubtedly improved the safety performance of shipping and the lot of the average Australian seafarer since the introduction of the Act.

⁶ The Australian Transport Council comprises Commonwealth, State and Territory Ministers with responsibility for transport matters, including marine transport and ports issues.

⁷ House of Representatives Standing Committee on Transport, Communications and Infrastructure (1998), p43.

However, the basic circumstances of a potentially dangerous environment, an isolated workplace and close living/working conditions remain a feature of the industry.

1.13 It has been argued that these aspects of shipping warrant consideration of regulations for the industry separate from those that apply more generally across the economy to other businesses and industries. The task for the review team has been to assess the extent to which these features warrant special attention under modern circumstances and values.

Review Principles

1.14 The review has adopted a number of principles to guide its assessment of the core features of the Act and its detailed contents:

- A more flexible and transparent regulatory structure is required, that can respond quickly to technological changes and international trends in ship safety and its legal and administrative environment.
- It is in the interests of international trade facilitation and the Australian shipping industry that Australian regulation of shipping is consistent with mainstream international practice and laws. Where there is no clear or pressing reason to change the direction of regulation, provisions of the *Navigation Act 1912* should continue to reflect commonly accepted international arrangements. Generally this will mean implementation of Flag State responsibilities combined with a strong Port State role.
- Modern regulation should emphasise performance outcomes and provide flexibility for businesses in meeting their responsibilities, within the constraints of consistency with international convention requirements.
- Regulations should avoid introducing distortions into the shipping market.
- In the areas of labour laws and commercial relationships, shipping should be treated to the maximum extent possible in the same way as any other industry. Wherever possible, regulation of industrial and contractual arrangements should be provided by the labour and commercial laws common to all industries.
- Where specific shipping employment and commerce matters are unique and cannot be covered adequately by general business, industrial or consumer legislation, there should be special provisions within shipping legislation. These provisions should be included in a separate Part of the legislation that deals with non-safety related matters.
- Legislation must be accessible and readily understood so that participants in the industry can easily determine their responsibilities and obligations.

1.15 Submissions to the review have generally been consistent with the above principles and directions.

1.16 There is a continuing public and Parliamentary interest to ensure that foreign seafarers aboard ships servicing Australia's trade are not abused. International law

provides that the primary responsibility for regulating such matters rests with the Flag State, but there are humanitarian reasons why Australia may wish to intervene to prevent gross abuses. The proposed restructuring of the Act and its focus on the duties and responsibilities of persons connected with a ship will provide scope for AMSA to intervene on matters that affect the safe operation of a ship. However, the Minister has confirmed that the Government's preference is that, where foreign seafarers' employment matters are not directly related to safe shipping operations, these issues are best addressed under other legislation or administrative actions.

1.17 The review is proposing significant changes in policy emphasis and the scope of the legislation. This suggests that a modern regulatory regime that reflects contemporary characteristics of world and Australian shipping, as well as modern policy approaches to regulation, will require entirely new legislation, rather than amendment of the *Navigation Act 1912*. The review proposes that the *Navigation Act 1912* be progressively repealed as new parts are drafted dealing with the major issues identified in the report, and to remove redundant elements. Some elements of the legislation that are now redundant can be repealed quickly.

1.18 In a number of areas, the proposed directions for changes to Commonwealth regulation of shipping will require detailed consultation with the States and Territories to ensure that unintended gaps in regulatory coverage do not occur, and that consistency in the direction of regulation is maintained. The relevant provisions of the *Navigation Act 1912* should be maintained until these consultations have established the appropriate basis for legislative coverage and adequate transition arrangements. This supports a staged approach towards legislative change.

Matters Not Covered by the Review

1.19 The review has not addressed a range of matters affecting the *Navigation Act 1912*, as these issues are being or have been considered in other forums. These matters include:

- the policy basis for regulation of the coastal trade (Part VI of the Act). This issue is specifically excluded from the terms of reference. These matters were reviewed by the Shipping Reform Group in 1997 and the Shipping Reform Working Group 1999, as noted above.
- matters relating to jurisdiction between the Commonwealth and the States for safety regulation of trading vessels. These matters have been considered independently by the Australian Transport Council (ATC). Discussions are presently under way with the States and Northern Territory to amend jurisdiction for vessel safety regulation. It is proposed that the Commonwealth will be responsible for regulation of all foreign trading vessels other than those under 500 GT on intrastate voyages, all Australian trading vessels voyaging overseas and all Australian trading vessels over 500 GT on coastal voyages. It is expected this amendment will take effect from 1 January 2001. The recommendations of the ATC will be separately incorporated into the revision of shipping regulation.
- those aspects of employment of seafarers that were the subject of the Navigation Amendment (Employment of Seafarers) Bill 1998. Provisions of the Act affected

by the Bill can be found at <http://www.aph.gov.au/parlinfo/billsnet/98241b01.doc>. On 8 March 2000 the Senate proposed substantial amendments to the Bill, effectively removing most major elements. At the time of presentation of this report, the Government had not responded to the proposed amendments, and this report has not re-examined the matters subject to the Bill.

- a range of matters affecting shipping covered by other legislation, such as ship registration, marine pollution from ships, occupational health and safety and workers' compensation, limitations of liability for pollution damage or loss or damage to cargo, collection of revenues and levies from shipping and economic regulation of international liner shipping.
- the detailed requirements of Marine Orders. In many cases, the details contained in Marine Orders are very prescriptive, and this extensive prescription can impose some constraints on the competitiveness of Australian businesses. The high level of prescription reflects both the prescriptive nature of relevant international instruments adopted by Australia and earlier practice towards interpretation of international instruments when these are translated into national laws. At the suggestion of the Steering Group, the Australian Maritime Safety Authority, the Australian Shipping Federation and the Australian Mines and Metals Association established a process to jointly review Marine Orders, commencing with priority areas of most relevance to the industry (see Chapter 8 for further details).

Conduct of the Review

1.20 The review was conducted by officials of the Department of Transport and Regional Services and the Australian Maritime Safety Authority. The review team operated under the guidance of an independent Steering Group comprised of:

Chairman:	Mr Rae Taylor AO
Private sector members:	Mr Lachlan Payne Chief Executive Officer Australian Shipping Federation
	Mr Barry Vellnagel Deputy Director Minerals Council of Australia
Government members:	Mr Clive Davidson Chief Executive Australian Maritime Safety Authority
	Ms Joanne Blackburn Assistant Secretary, Cross Modal and Maritime Transport Department of Transport and Regional Services

1.21 The Steering Group provided guidance and direction to the review team and acted as an external reference for the conduct of the review.

1.22 An Issues Paper,⁸ containing relevant background material on the *Navigation Act 1912* and setting out some main issues to be covered by the review, was distributed to over 200 stakeholders. The review team wrote in August 1999 to interested parties, sending them a copy of the Issues Paper and inviting submissions. Stakeholders consulted included shipping lines and shipping organisations, the offshore petroleum industry, cruise shipping companies, classification societies, maritime unions, shipper organisations, marine pilots, shipbuilder associations, international, Commonwealth and State government agencies, seafarer welfare organisations and conservation groups. The review was also advertised in major newspapers and in the specialist shipping papers *Lloyds DCN* and *Lloyds International*.

1.23 The review terms of reference and the Issues Paper were made available on the Department of Transport and Regional Services' website and the fact of the review also was advertised in in-house journals of the Australian Shipping Federation and the Minerals Council of Australia. A general invitation to make submissions to the review was also extended to participants at the 1999 Annual Conference of the Maritime Law Association of Australia and New Zealand, held in Canberra from 25 to 29 September 1999.

1.24 Submissions were received from 44 individuals and organisations. Details of persons and organisations making submissions to the review are at [Appendix A.2](#).

1.25 Workshops were held in Melbourne, Sydney and Perth during September 1999 to brief industry on the review and to identify the main issues of concern to the shipping, bulk shipper and offshore petroleum industry support sectors. The National Marine Safety Committee Industry Advisory Panel (IAP) was briefed about the review on 31 August 1999 in Brisbane. The IAP comprises around 20 representatives of fisheries, recreational boating, towage, shipbuilding, port authority and other shipping industry sectors and State government maritime agencies. The review team also met with the Maritime Union of Australia, the National Marine Safety Committee Secretariat and the National Oil and Gas Safety Advisory Committee in October 1999.

1.26 Additional consultations on the treatment of offshore petroleum installations were held with the Australian Petroleum Production and Exploration Association and the Department of Industry, Science and Resources (DISR). The review has endeavoured to ensure close consultation with parallel reviews being conducted by DISR of the *Petroleum (Submerged Lands) Act 1967* and the associated safety case regime for offshore petroleum installations.

1.27 A progress report was provided to the Minister for Transport and Regional Services in December 1999, outlining the principal issues and proposed policy directions for the review. The Minister endorsed the proposed directions as a basis for further consultations with stakeholders.

⁸ Department of Transport and Regional Services (1999)

1.28 A Directions Paper⁹ was circulated to stakeholders and was also posted on the Department of Transport and Regional Services' website in March 2000. The draft report outlined the major issues identified by the review team, including those raised in submissions, and presented preliminary findings and proposed directions for further comment by stakeholders. A further 25 submissions were received commenting on the Directions Paper. Details of persons and organisations making submissions are at Appendix A.2.

1.29 Additional workshops were held during April 2000 in Brisbane, Sydney, Melbourne and Perth to provide an opportunity for industry to discuss the proposed directions with the review team and members of the Steering Group. Maritime unions were invited to meet with the review team to discuss the proposed directions. The review team met with the Maritime Union of Australia in May 2000.

⁹ Department of Transport and Regional Services and the Australian Maritime Safety Authority (2000)

THE NEED FOR AND IMPACT OF REGULATION

2. THE NATURE OF AUSTRALIA'S SHIPPING SERVICES

Australia's Shipping Requirements and Trends

International shipping

2.1 Maritime trade is critical to the Australian economy, as around 99.9% of Australia's international merchandise trade by volume is transported by sea. In 1998-99, around 488 million tonnes of imports and exports were carried by sea, with a value of \$136.7 billion.

2.2 Sea-borne exports comprise the vast majority of Australian internationally traded goods, in weight terms around 88%, reflecting that our major exports are bulk products. During 1998-99, the top five export commodities by volume were raw materials: coal, iron ore and concentrates, cereals, crude minerals and petroleum oil. These accounted for 84% by volume of export trade, and 30% of the value.

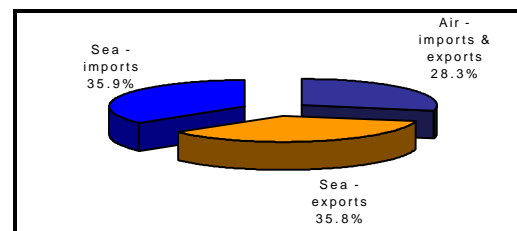
2.3 Imports by sea comprised around 11.5% by volume of the total trade, but around 36% by value. Australia's major import commodities by volume include crude petroleum, chemicals, iron ore and concentrates, fertilisers and refined petroleum. In 1998-99 these accounted for about 73% of the total quantity of Australian imports, but only 15.3% of the value of imports, or around \$10.5 billion. The top five import commodities by value were machinery, road vehicles and transport equipment, manufactured articles, chemicals and petroleum oil. These accounted for 65.2% by value and 59.4% by volume of imports.

Fig 2.1: 1998-99 Total International Trade by Volume – 489 million tonnes



Source: Bureau of Transport Economics

Fig 2.2: 1998-99 Total International Trade by Value – \$190.9 Billion.



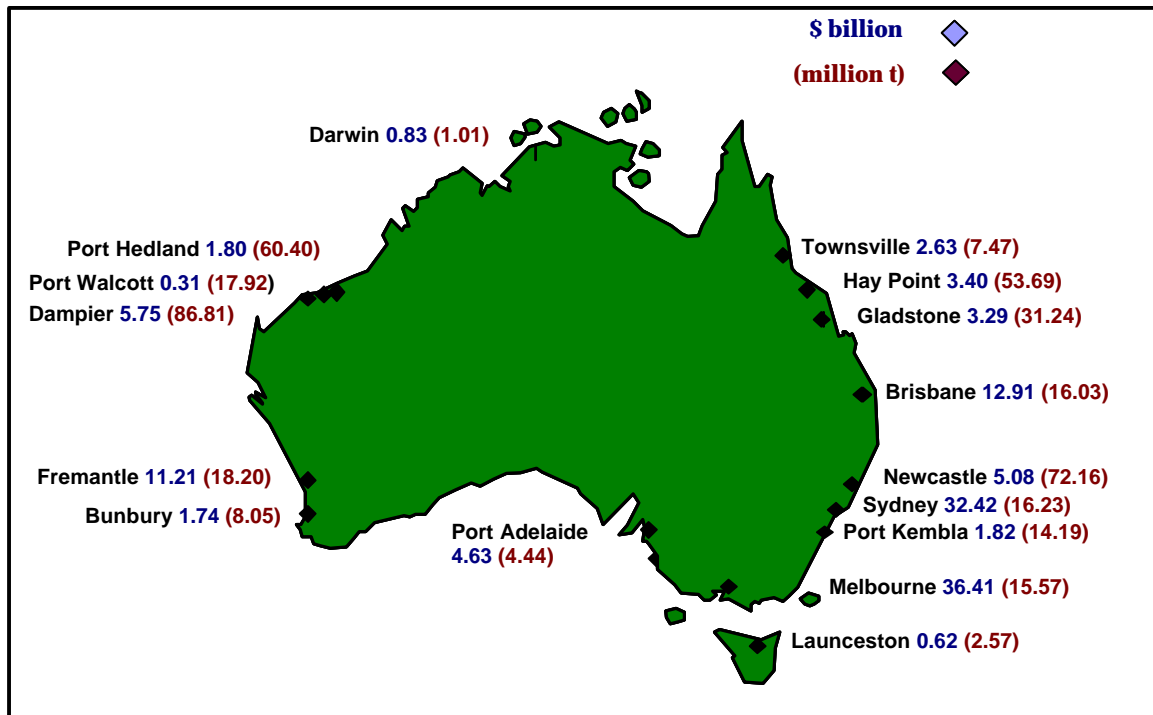
Source: Bureau of Transport Economics

2.4 In 1998-99, 93% of all Australian export volume and approximately 45% of export value was handled through bulk terminals of both publicly and privately owned ports. The busiest ports in terms of weight handled are the bulk export ports of Dampier, Port Hedland, Hay Point, Gladstone and Newcastle.

2.5 The busiest import port in 1998-99, by both weight handled and value, was Sydney (including both Sydney Harbour and Port Botany). Melbourne handled the greatest number of containers. Other State capital ports also handled significant proportions of imports by value. This pattern of import trade reflects the nature of our

imports of machinery and manufactured products and correlates logically to areas of population and manufacturing concentration in Australia.

Fig 2.3: Total international trade – Major ports by value and tonnage, 1998–99



Source: Bureau of Transport Economics, based on unpublished Australian Bureau of Statistics International Cargo Statistics.

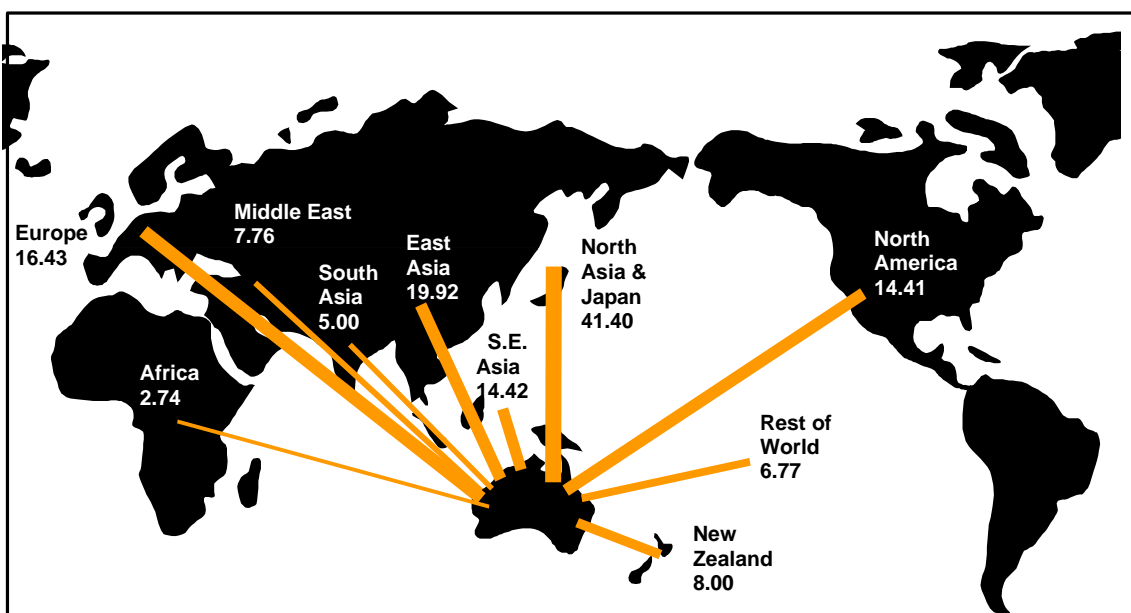
2.6 In 1998–99, 93 per cent of all Australian export volume (approximately 45 per cent of export value) was handled through bulk terminals of both publicly and privately owned ports.

2.7 On a tonne-distance basis, Australia has the fifth largest shipping task in the world, representing about 13% of the world seaborne trade task. This requirement gives Australia a significant impact on world shipping as a purchaser of shipping services, although the Australian fleet as a supplier of shipping services traditionally is quite small. Australian ships traditionally have carried a very small proportion of our trade, and for various reasons the proportion has declined steadily over the past five years. In import trades, Australian ships' participation has declined from 6% of value and 2% of volume in 1994-95 to around 3% of both value and volume in 1998-99. In exports, Australian shipping has maintained a steady 2% of export tonnage carried over the period, but this has declined in value from 6% to 3% between 1994-95 and 1998-99.

2.8 Trade between Australia and Asia currently exceeds trade to all other parts of the world combined, accounting for \$75bn or 55.3% of our trade. Europe (12%) and North America (10%) represent the next largest trade flows. There were 18,567 individual ship visits to all Australian ports in 1999. In addition to bulk carriers, some 70 shipping lines provide regular shipping services. A significant feature of the Australian liner shipping trade is its thinness (relatively low volumes carried over large distances) compared to other international shipping markets, resulting in liner container services making multiple port calls in Australia.

2.9 There is also evidence of an emerging market in large bulk oil and gas tankers off-loading cargo at multiple ports in Australia, including the use of ship-to ship transfers at sea. Ship to ship transfers outside the territorial sea are a feature of a recent minerals export project in North Queensland, and also occur in the offshore oil and gas production industry. A similar ship-to-ship transfer operation for an Australian wheat shipment to Iraq was recently completed, with cargo unloaded in the Gulf from a Capesize vessel to three Panamax size ships over a two week period. Reasons for ship-to ship transfer are cited as minimising freight costs and the ability to “work outside the normal practices in unloading the vessel”.¹⁰ Ship to ship transfers may also help to overcome limited water depth in some ports, and to avoid or reduce port dues payable on the larger vessel, as well as port State inspection of the vessel.

Fig 2.4: Australian maritime trade by total value (\$billion), 1998–99



Source: Bureau of Transport Economics, based on unpublished Australian Bureau of Statistics International Cargo Statistics.

2.10 The number of cruise ships visiting Australia is small by world standards, but there are signs of strong growth. In 1998 there were 185 port visits by 38 cruise ships in Australia, up from 140 visits by 25 vessels in 1995-96. There are indications of further strong growth ahead, with Sydney alone expecting around 184 cruise liner visits by 2002. The cruise industry in Australia is dominated by foreign flagged ships.

Coastal Shipping

2.11 Coastal shipping transported an estimated 52.5 million tonnes in 1997-98 or just 3% of the domestic freight task. This represents an increase of 18 % in the volume of cargo carried by sea since 1992-93. On a net tonne-kilometre basis, coastal shipping accounted for around 34% of the domestic freight task in 1997-98, about the same as road or rail, demonstrating the long average hauls of coastal shipping relative to other modes of transport.

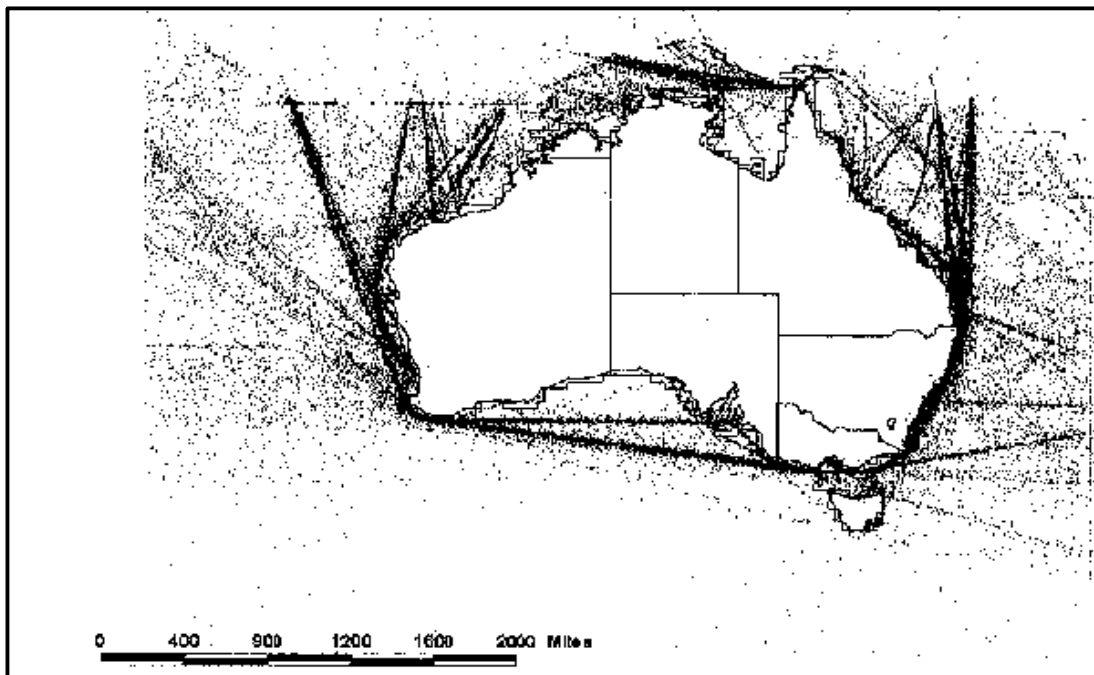
¹⁰ *Australian Shipping News*, 28 April 2000.

2.12 Coastal shipping is only a significant mode of domestic transport for bulk freight. Approximately 30% by volume of coastal sea borne trade is liquid bulk, 60% dry bulk (mainly mineral ores and coal), about 4% is containerised and 6% is break-bulk and general cargo. A major element of Australia's non-bulk coastal trade is across Bass Strait, which also provides the only significant sea borne passenger trade within Australia. Australian flagged ships carry about 90% of coastal cargoes.

2.13 A small but steadily increasing proportion of coastal cargoes are now carried by unlicensed ships, mainly foreign flagged, using the Single Voyage Permit (SVP) and Continuous Voyage Permit (CVP) arrangements under Part VI of the *Navigation Act 1912*. The number of SVPs issued increased from 434 in 1994-95 to 704 in 1998-99, while 41 CVPs were issued in 1998-99. Tonnage carried under permits increased from 3.5 million tonnes in 1994-95 to 7.3 million tonnes in 1998-99. Petroleum products accounted for the largest share of tonnage carried under permits, at around 60% in 1997-98, followed by dry bulk at 25% and general cargo at 12%.

2.14 Figure 2.5 shows the pattern of trading around the coast, based on position reporting to the Ausrep centre. It clearly shows major shipping lanes around Australia, including the predominance of voyages in coastal regions and through the sensitive Great Barrier Reef region, the North-West Shelf and Bass Strait. Many of these areas are also of considerable economic, ecological and recreational value to the Australian community, encompassing a wide range of other users. The value of marine based industries has been estimated at around \$30 billion per annum or 8% of gross domestic product, and may be valued at between \$50 billion to \$85 billion annually by 2020.¹¹ To this must be added the unquantified value of marine resources, social amenity and biological diversity in the Australian EEZ.

Fig 2.5 Indication of Shipping Routes, Australia 1999



Source: AMSA, AUSREP Centre

¹¹ Commonwealth of Australia (1998), Australia's Oceans Policy, p8

Australia's Shipping Fleet

2.15 The Australian major trading fleet is small, comprising 56 vessels over 1000 deadweight tonnes (DWT) in 1999, and with a further 12 minor trading vessels between 150 and 1000 DWT.

2.16 There is considerable diversity in the Australian fleet, supplying a wide range of users. About half of the major trading fleet are bulk carriers, with a further quarter being tankers and the remainder being general cargo, ro-ro or container vessels. Approximately 85% of coastal cargo is carried by the vessels of vertically integrated operations. There were an additional 60 offshore exploration and development vessels in 1999, of which 55 were rig service and supply ships.

2.17 The number of Australian flagged major trading ships has declined continuously from 78 vessels in 1994 to 56 in 1999, or by 25% in the last five years. This decline has increased Australia's reliance on foreign ships to service our trading needs, both internationally and in the coastal trade. Offshore vessels have declined from 78 in 1997 to 60 in 1999, a fall of 23% which also principally reflects the trend towards use of foreign flag ships in the industry. These have mainly been ships that have moved from the Australian flag to other flags.

2.18 The Australian fleet is now predominantly engaged in the coastal trade, which has traditionally been served by Australian crewed vessels. The Australian fleet suffers a significant cost disadvantage internationally. The fleet has declined substantially and contracted to the point where it represents only about 3% of Australia's international shipping task, due to the high costs of employing crews and the tax and other fiscal advantages available in some other countries.

Shipping Accidents and Incidents – The Ship Safety Problem

2.19 In the period 1985 to 1997 there were 3005 total losses of trading vessels worldwide. Of these over 41% involved general cargo ships, 6% were dry bulk carriers and 5% were tankers. Of the 106 bulk carrier losses that occurred between 1990-97, 31 were vessels that sank without trace, apparently due to total structural failure. The OECD estimates that each 100 vessels lost represents around US\$2 billion, not including cargo values.¹²

2.20 There are around 1000 serious casualties in world shipping per annum, with net insurance claims growing to over 1.5 billion pounds sterling a year, or by 375% over the past three decades compared with growth in ship numbers of around 12%.¹³

2.21 There were 2519 fatalities in cargo carrying ships worldwide between 1989 and 1997. Around 60% occurred in general cargo shipping and a further 30% in dry bulk shipping. The number of seafarer lives lost worldwide in 1997 was 184, second lowest since 1989 and representing the fourth consecutive annual reduction.¹⁴

¹² OECD (1999)

¹³ Australian Maritime Digest, 1 May 1999

¹⁴ Lloyds List, World Casualty Statistics

2.22 Most maritime casualties are caused or aggravated by human error. Incident investigations undertaken by the Commonwealth Marine Incident Investigation Unit show a high proportion of accidents were caused by basic errors of seamanship, resulting in collisions and groundings. Major structural failures of vessels accounted for a small but significant proportion of incidents during the 1980s, but have since declined with more rigorous regulation and inspection of vessel standards.¹⁵

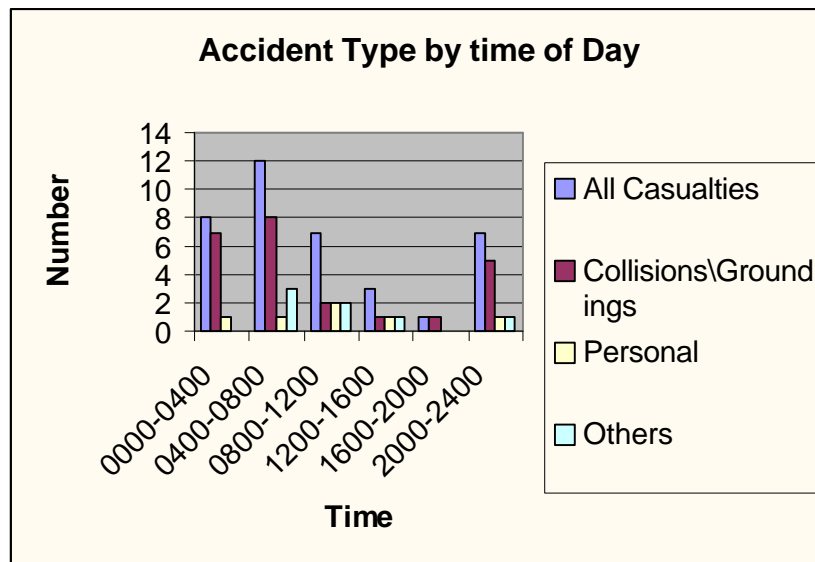
Table 2.1 Sources of Maritime Incidents, Australia 1982-98

Type	Number	Percent
Collision	33	24.4
Grounding	48	35.6
Fatality/ injury	16	11.9
Vessel/ equipment failure	24	17.7
Founder/ capsized	14	10.4
Total	135	100

Source: Marine Incident Investigation Unit reports.

2.23 Problems of fatigue, well being and time constraints have affected the crews ability to ensure the safe conduct of the ship. Figure 2.6 shows that a large majority of casualties and accidents that can be attributed to a lack of alertness of the crews happen in the hours of darkness, which can indicate fatigue and a lack of attention to detail. The other accidents that can be attributed to equipment failure tend to occur evenly throughout the day and point to poor maintenance.

Fig 2.6: The relationship between time of day and accident type



Source: Marine Incident Investigation Unit

¹⁵ Marine Incident Investigation Unit (various years) Investigation reports.

2.24 Port State Control inspections undertaken by AMSA reveal a continuing high level of significant safety deficiencies. The main source of deficiencies are in life saving and fire fighting equipment, accounting for 36% of deficiencies recorded in 1999. Many if not all such deficiencies might have been prevented with proper maintenance. Reasons for lack of maintenance may include:

- inadequate management of ships by owners and operators,
- inadequate inspection or concern on the part of ships' officers and crew,
- inadequate provision of resources,
- inadequate surveys by the flag state or classification society, or
- insufficient crew numbers on board vessels, leading to insufficient crew available for equipment maintenance.¹⁶

Table 2.2: Ship Inspections and Detentions, Australia 1995-1999

	1995	1996	1997	1998	1999
Total Inspections	2542	2901	3131	2946	2753
Total Detentions	244	248	203	201	145
Detention Rate (%)	9.6	8.5	6.5	6.8	5.3

Source: AMSA (various years) Port State Control Annual Report

2.25 In 1999, 145 ships from 36 countries were observed to have deficiencies serious enough to impair their seaworthiness and to warrant detention in Australia. This represented 5.3% of ships inspected, a decline from the peak of 9.6% in 1995 following a period of more extensive inspection and enforcement of regulations.

2.26 The number of injuries to Australian seafarers, and reported incident rates, has declined steadily since 1994. While there may be some risk of under-reporting, AMSA notes "Hopefully, this trend will continue in successive years and demonstrate the efficacy of OH&S strategies put in place by ship operators."¹⁷ If the average economic cost of an injury is around \$50,000, the saving in injury costs in 1998-99 compared to 1994-95 would be over \$3 million.¹⁸

Table 2.3: Incidence of Injuries to Seafarers, Australia 1994-1999

Year	No. of Seafarers	No. of Injuries	Incident Rate (%)
1994-95	4830	173	3.58
1995-96	4080	162	3.97
1996-97	3638	119	3.27
1997-98	4058	112	2.75
1998-99	3530	64	1.81

Source: AMSA Occupational Health and Safety (Marine Industry) Act 1993 – Incident reports for the Period 1994/95-1998/99, p19

¹⁶ AMSA (various years) Port State Control Annual Reports

¹⁷ AMSA (1999) Occupational Health and Safety (Marine Industry) Act 1993 – Incident Reports for the Period 1994-95 to 1998-99

¹⁸ Calculated notionally as 3.58% to 1.81% applied to 3530 seafarers at \$50,000 per incident.

2.27 These results indicate there is a continuing need for ship owners and operators to pay closer attention to ongoing safety management at all times, not just when a routine survey is due. Regulation of safety standards and inspection and certification measures play an important role in ensuring that owners and operators meet their obligations in safety matters.

Pollution

2.28 Oil spills from shipping receive a wide degree of public interest and extensive media coverage, despite only 11% of annual oil pollution of the sea coming from tanker operations and another 14% from other shipping, either from vessel operations or accidents. In contrast land based waste contributes around 61% of annual pollution of the sea by oil.

2.29 International data suggests around 50 incidents involving oil spills of more than 7 tonnes occur per annum worldwide. For large oil spills, over 700 tonnes, the trend has declined from an average 24 incidents per annum in the 1970s, to 8 incidents per annum in the 1990s. The trend for major operational oil spills, eg from vessel tank cleaning or refuelling, has declined from an average 77 per annum in the 1970s to 37 per annum in the 1990s.

2.30 Spills resulting from collisions or groundings account for over 90% of major spills. For smaller spills of less than 7 tonnes, the primary causes of ship-related spills are in loading or discharging of cargoes (71% of all ship sourced spills) or bunkering (12%). Responsibility for spills of this type is generally attributable to equipment failure, the human factor or conditions prevailing at the time.

2.31 As the cargo oil lost from tankers declines, the relative significance of bunker spills from other types of shipping is increasing. Over the past 15 years, 28% of major oil spill incidents have involved loss of ships' fuels from ships other than tankers. In the last five years the proportion has increased to 38% and in the last year it was 50%.

2.32 The International Tanker Owners Pollution Federation Ltd (ITOPF) notes two significant trends in oil spills over 7 tonnes in the periods 1987-92 and 1993-98. The number of spills due to hull failure in the second period was 51% lower than in the first period. Conversely, the number of oil spills from groundings increased by 37%. It notes that possible causes for the reduced incidence of hull failure include the scrapping of older tankers and the introduction of more rigorous ship inspection programs. IOTPF suggests the increased rate of groundings could be due to shortcomings in passage planning and pilotage, or increasing problems with water depth and navigation aids in certain parts of the world.¹⁹

2.33 Costs of oil spills, whether from tanker cargoes or ships' bunker fuels, can be significant. Table 2.4 shows that costs of a spill can vary considerably. Much of this variation depends on the nature of the oil and the location of a spill.²⁰ The table also demonstrates that it does not take a large pollution incident to generate large costs. In

¹⁹ *Shipping Australia*, March 2000, Tanker Spill Statistics

²⁰ These estimates significantly understate the full costs of oil spills, as the data do not include spills that were not subject to IOPC Fund claims, outstanding or disputed claims, and spills that were not quantified by the IOPC Fund. Other costs would be borne by shipowners' P&I club insurance, by industry or by governments.

some instances, modest pollution in environmentally sensitive areas has given rise to high claims for compensation and clean up costs.

Table 2.4 Summary of incidents and payments from the International Oil Pollution Compensation Fund, 1970-1999

Tonnes spilt	No. of Incidents	Total Payments (A\$m)	Average payment (A\$m)
<100	37	143.345	3.874
101-500	17	102.136	6.008
501-1000	10	19.875	1.987
1001-5000	8	11.996	1.499
5001-10000	8	682.424	85.303
>10001	11	320.557	29.142
Total	91	1,280.334	14.070

Source: Derived from International Oil Pollution Compensation Fund, Annual Report 1999

2.34 Schmidt Etkin (1994)²¹ reported average clean-up costs of US\$12.99 per gallon spilt worldwide, US\$15.52 in Northern Europe, US\$17.26 in North America and US\$6.99 in the Far East, although he cautions that there is only a poor correlation between spill quantity and clean-up costs. These estimates reflect the differing densities of population and businesses, as well as differing values placed by communities on environmental and economic assets affected by spills.

2.35 A large spill affecting the coastline, however, can involve dramatic costs, including the costs of the lost vessel and cargo, clean-up costs, fines and compensation for loss or damage caused to third parties as a result of the spill. For example, the *Exxon Valdez*, a tanker which ran aground in Prince William Sound, Alaska in 1989, spilt about 35,000 tons of oil. Exxon spent some US\$2 billion cleaning up the spill, and a further US\$1 billion to settle immediate civil and criminal charges related to the case²². The eventual costs to Exxon of the spill could total US\$9.6 billion when all liability and compensation claims are settled.²³ This spill ranked only 40th in magnitude of oil spills from ships.

2.36 Australia has been fortunate in that it has experienced a relatively small number of pollution incidents from shipping, with only two major oil spills in international terms since 1970, and the costs of pollution incidents also have been relatively small to date. The largest spill in Australian waters in recent years was caused by the structural failure of the Greek registered oil tanker *Kirki*, about 50 kilometres off Western Australia in 1991, which released 17,280 tonnes of crude oil. As the majority of the spill either evaporated or was broken up and dispersed by heavy seas, substantial clean up, significant economic losses and environmental damage costs were avoided in this instance. By contrast, the *Iron Baron* grounding incident near the port of Launceston in 1996 involved the loss of around 300 tonnes of

²¹ Schmidt Etkin (1994) The Financial costs of Oil Spills, Cutter Information Corp, Massachusetts.

²² Enger & Smith (1992) Marine Oil Pollution, from Environmental Science: A Study of Interrelationships.

²³ OECD (1999) Discussion Document on Regulatory Reform in International Maritime Transport DSTI/DOT/MTC (99)8

bunker fuel with clean up costs of around \$10 million.²⁴ The *Laura D'Amato* incident in Sydney Harbour in 1999 involved an operational spill of around 250 tonnes with claims for clean up costs, legal proceedings and fines totalling more than \$3 million to date.

2.37 There are considerable difficulties in evaluating the potential costs of pollution and in estimating the degree of risk of an incident occurring. Nevertheless, it has been recognised that in the event of a major oil spill both economic loss and damage to the marine environment are potentially very high. This includes potential damage to high value, environmental resource based industries such as tourism and fishing, which generate incomes in excess of \$5.3 billion annually in the Great Barrier Reef region, for example.²⁵ The Bureau of Transport and Communications Economics (1991) estimated that the probability of a major oil spill (greater than 1000 tonnes) from tankers in Australian waters is high at 48% in a five year period, and could be up to 93% in a twenty year period, based on extrapolations from international spill data. While this study did not evaluate the extent to which regulation contributed to any reduction in risk, it did state “ The virtual absence of large spills in Australian waters is a testament to the effectiveness of preventative measures taken by industry and government.”

2.38 While much of the focus on marine pollution has been on the impacts of oil spills, shipping also poses a range of other pollution risks. These range from hazardous and noxious cargoes, disposal of garbage and sewage, debris (particularly plastics), air pollution, toxic anti-fouling paints and the introduction of exotic marine pests.

Conclusions

2.39 The above analysis leads to a number of conclusions about the nature of the shipping industry servicing Australia, and the problems that shipping regulation must address:

- Shipping is essential to Australia's trade, and cannot be readily replaced by alternative forms of transport. It is not an option to address environmental and safety concerns by constraining shipping operations.
- There have been improvements in ship safety and pollution prevention over the past 10-15 years (in part due to strong regulation). However, there is still a significant number of incidents occurring each year, both nationally and internationally, and the costs of an incident are potentially very high. Given the incidence of global shipping accidents each year, and the high reliance of Australia on shipping services, Australia is exposed to the risk of serious incidents, and requires an appropriate regulatory regime to address these risks.
- The majority of Australia's shipping task is undertaken by foreign flagged ships. While the ability of Australia to influence the quality of these ships and their crews is limited, it is in our national interest to ensure our regulations are capable of dealing with both foreign and Australian ships.

²⁴ This is a lower bound estimate of costs as it does not include factors such as loss of wildlife.

²⁵ AMSA (1993), Review of the National Plan to Combat Pollution of the Sea by Oil, AGPS, Canberra

- The smaller Australian fleet is becoming increasingly specialised into niche markets. Each market has different characteristics and operational needs. Regulation needs to be flexible in catering for these needs.
- Most incidents are due to fatigue and other human factors, so there is a need to focus on performances of both ship and shore based personnel, as well as on ship standards.

3. Costs and Benefits of Regulation

3.1 The review terms of reference require the review to, inter alia,:

- identify the nature and extent of restrictions on competition contained in the Act,
- identify relevant alternatives, including non-legislative approaches,
- analyse and as far as practicable quantify the costs and benefits and the overall effects of the Act and any alternative approaches, and
- identify the groups likely to be affected by the legislation and alternatives.

3.2 The review engaged consultants, Elvet Pty Ltd and Len Early Pty Ltd, to evaluate the nature and extent of these considerations. The following analysis is based on the consultants' report.

Who is affected by Regulation

3.3 The wide-ranging coverage of the Act affects a large number of interests. These include:

- the commercial shipping industry, encompassing owners, managers, financiers, insurers, operators and agents
- fishing and tourism operators whose ships voyage overseas
- the offshore oil and gas industry
- the ship design, building and maintenance industry
- suppliers of shipping equipment and supplies
- ship classification societies and surveyors
- coastal pilots
- marine salvage companies
- seafarers, maritime unions, and seafarer welfare agencies
- maritime training institutions
- maritime legal practitioners
- consignors of cargoes
- Commonwealth, State and Territory maritime regulatory authorities
- other government agencies exercising functions under the Act or whose activities are influenced by the Act
- the general community whose interests are protected by regulation, including businesses that may be adversely affected by unregulated activities of shipping.

3.4 This wide coverage can be grouped under the general headings of participants in the shipping industry (including ancillary businesses and employees), direct users of the industry's services (ie cargo interests), the regulators and the general community.

The Nature of Restrictions on Competition

3.5 The legislation and regulations which are subject to the review (i.e. excluding Part VI of the Act concerning the coasting trade) may be considered to impose the following types of restrictions on competition:

1. Licensing standards to participate in the industry.

The Act requires all persons wishing to act as a ship's master, crew or a pilot to be properly qualified. Certification conditions specify the nature of skills, experience and fitness required. These requirements restrict entry into the industry of persons not meeting the specified conditions. However, all persons meeting the required standards are eligible for granting of a certificate and the legislation does not discriminate on grounds other than competency and fitness for duty.

2. Certification standards for ships and equipment

All ships are required to meet a minimum level of standards for construction, equipment, safe manning and maintenance. In the main, statutory requirements align with those prescribed in international maritime conventions, although in a few instances standards reflect particular Australian requirements. These standards restrict the ability of an owner, operator or builder of a ship of lesser standards to participate in the industry.

Where Australian standards differ from international standards, competition may be restricted by the additional costs facing Australian operators who wish to trade internationally, due to the need to comply with several differing standards.

Additional costs may also arise where shipping regulation duplicates or contradicts other Commonwealth or State/Territory regulations. Prescriptive standards may also inhibit the adoption of innovative solutions where regulation has not kept pace with the introduction of new technologies, or where standards designed for one industry sector are applied across all sectors, which may have different characteristics or needs.

3. Employment conditions for crews aboard Australian ships

The current legislation prescribes a range of matters regulating the employment of seafarers, in some instances reflecting the nature of industry-wide industrial agreements, as well as international convention requirements. Prescription of such matters on an industry-wide basis reduces the ability of individual enterprises to negotiate employment arrangements that would more appropriately suit individual operating circumstances and market sectors. Regulations may also limit the ability of ship owners and operators to acquire alternative, more internationally competitive equipment, such as new ships, which do not comply with Australian employment-related regulations.

4. Accreditation of certification authorities

The legislation provides for inspection and issuing of ships' certificates of survey by government appointed surveyors or accredited classification societies. Some certification activities may also be undertaken by overseas administrations. The regulations also provide for accreditation of seafarer training institutions and issuing of seafarer certificates. The scope for use of

external agencies for these purposes provides for efficiencies to be realised from competition, however, those agencies that do not meet accreditation standards will be excluded from the market.

5. Prescription of maximum fines and penalties

There is a large number of offences in the legislation attracting substantial penalties for breaches. Penalties may be of such an amount that they deter or restrict participation in the shipping market.

3.6 The regulations are, in the main, intended to promote public safety, protection of the environment and to provide for “fair trading” among industry participants, rather than to confer economic advantage on particular industry participants. Regulation of occupational and ship certification and of minimum conditions for seafarers is premised on the perceived need to protect the community and those in a disadvantaged bargaining position from incompetent or unscrupulous practitioners.

3.7 It has been argued that the regulations confer an unfair competitive advantage on foreign ships that do not observe the same standards. It should be noted, however, that the regulations also provide for inspection and detention or prosecution of foreign ships that do not meet minimum agreed international standards while visiting Australian ports.

3.8 There have been arguments that some foreign ship registers do not apply the same standards as Australia and, as a result, competitors of Australian trade gain a competitive advantage from use of such shipping, including from those that do not trade into Australian ports.

3.9 The inconsistent application of internationally agreed standards around the world has an impact on the competitiveness of Australian exporters, particularly for low value bulk commodities such as iron ore. However, this arises not from Australia’s regulation, but from the lack of enforcement of minimum standards elsewhere. Better application of internationally agreed measures throughout the world is a more appropriate approach than reducing Australia’s standards. Non-application of internationally agreed standards is the problem facing the shipping industry, not the solution.

The Nature of Costs and Benefits of Regulation

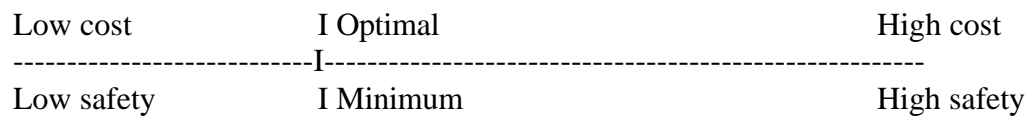
3.10 While regulatory requirements clearly impose real costs on the industry and the regulators, it is not clear to what extent individual businesses would have incurred similar costs voluntarily, either to address safety or environmental concerns, to avoid litigation or to provide appropriate conditions for employees. It is reasonable to infer from the evidence of continuing deficiencies in shipping standards that at least a proportion of shipping businesses would elect not to incur such costs in the absence of regulation.

3.11 Safety (which may include the health and safety of crews or protection of the environment) is costly to provide. Savage²⁶ postulates that in a free market industry

²⁶ Savage, I (1999) *The Economics of Commercial Transportation Safety*

would provide a continuum of services ranging from low cost-low safety to high cost-high safety, depending on each business's perception of the price the market for their services is willing to pay to achieve higher levels of safety (including reliability in delivery of goods etc), as illustrated in Figure 3.1. Passengers and shippers value safety, but by varying amounts, and high price and low price services may coexist in the market. A differentiated market does exist in shipping, making it optimal for several different levels of safety to occur in the market.²⁷ This coexistence is itself not evidence of market failure, as some customers will choose to patronise less safe carriers in preference to safer, more expensive carriers, depending on their sensitivity to price versus safety risk.

Fig 3.1 Range of cost and safety options available in transport markets



3.12 The range of safety-cost alternatives available to customers is desirable as it provides for a range of solutions that meet different needs in different market sectors. For example, a shipper of low value products such as coal would require a less safe and lower cost transport option than a shipper of high value, sensitive electronic equipment or motor vehicles.

3.13 Conversely, there is a point below which society deems it unacceptable for carriers to save costs at the expense of safety (see Figure 3.1), for example to protect the environment from pollution or to protect passengers or seafarers from unacceptably high risks of death or injury or inadequate working conditions. It is very difficult to determine this optimal minimum threshold, given the different circumstances of trading patterns and shipping markets around the world, the different cultural valuations of life and the environment and so on.

3.14 Ultimately it is a political judgement where this line should be drawn. Generally the world shipping community has decided on and adopted the body of rules of the IMO and relevant ILO instruments as an appropriate minimum benchmark. In several cases these rules have been developed following clear failures in the market, leading to disasters with high economic, social and environmental costs. Carriers that wish to provide higher levels of safety, however, are free to do so.

3.15 The task for government is to identify those ships operating below the optimal minimum standards, and to encourage operators of such ships to modify their behaviour so that they meet at least the minimum required standards or exit the market. This would be accomplished either by encouraging operators to voluntarily raise their expenditures on safety to the required minimum, or by imposing costs, such

²⁷ In economic terms the optimal level of safety incidents or pollution is not zero, as the marginal costs of achieving zero fatalities or pollution, for example, would significantly exceed the customer's (or society's) willingness to pay for the appropriate level of safety or pollution prevention. For this reason society tolerates varying levels of safety or pollution, and it ultimately is a political judgement as to the minimum level beyond which society demands intervention.

as mandatory insurance, detentions or fines, sufficient to eliminate the “savings” achievable by operating a sub-standard ship.

3.16 Savage identifies a number of features of market forces and failures that lead to low cost-low safety outcomes in commercial transportation:

- a limited number of competitors
- poor information available to customers
- irrational decision making by customers
- avaricious or inexperienced carriers (myopia)
- accidents where both carrier and another party must exercise due care
- propensity for harm to and ease of cost-shifting on to third parties.

3.17 The relative importance of these factors varies by mode, but arguably most if not all features are present in the shipping industry or in particular sectors of the industry. In particular, the relative ease with which costs of incidents or low standard operations in the shipping industry can be transferred to third parties is well documented.²⁸ Costs of ship and cargo losses, for example, are relatively easily passed on to the crew who die or are abandoned, insurers and financiers. Pollution costs are frequently borne by governments, businesses and other third parties adversely affected by pollution, and by insurers. A part of the costs of pollution incidents caused by low standard ships is also borne by higher standard operators through the price of their insurance premiums and more restrictive legislation. Low cost/low safety operators are able to operate in the market as long as they can avoid the externality costs of their operations, and find buyers (and their insurers) willing to take the risk of loss or damage to their vessels and goods in shipment.

Alternative approaches to regulation

3.18 The terms of reference for the review require that it “identify relevant alternatives to the Act, including non-legislative approaches”.

3.19 In considering the purposes of the legislation, it needs to be recognised that there is a strong and growing community interest in preventing pollution of the sea from all sources, including ships, and that there is also a continuing interest in preventing loss of life in shipping incidents. Australia traditionally has a very small shipping fleet in relation to the size of its shipping task and a strong reliance on foreign flagged shipping. If Australia is to successfully promote ship safety and marine environmental protection outcomes, it needs to be able to influence the international safety and pollution prevention agenda, both through the IMO and our regional trading partners.

3.20 The review has considered a number of options for meeting the desired objectives:

²⁸ For example, see Couper, Walsh, Stanberry & Boerne (1999) *Voyages of Abuse, Seafarers, Human Rights and International Shipping*, Pluto Press, London and OECD (1996) *Competitive Advantages Obtained by Some Shipowners as a Result of Non-Observance of Applicable International Rules and Standards*, OECD/GD996)4, Paris

No regulation

3.21 This alternative would involve Australia having no regulation of ship safety and pollution prevention. As it would not be good governance to simply ignore international convention obligations, it would be necessary for Australia to denounce those conventions to which we currently are a party, such as SOLAS and MARPOL. Legislation implementing these measures would need to be repealed.

3.22 Adoption of this approach would imply that shipping of any standard could come into and operate in Australian waters regardless of consequences. Suppliers of shipping services would be left to determine their own assessment of appropriate standards of behaviour. Some may choose to provide a “satisfactory” standard to avoid potential complaints and litigation from consumers and the community. Some may trade on the basis that a safer vessel and crew may enhance reliability for shippers and so may command a higher price than ships of a lower standard. Conversely lower standards may be preferred due to the cost and competitive advantages this may provide in a tight shipping market.

3.23 In a deregulated market, substandard suppliers are more easily able to avoid externality costs such as environmental pollution or safety incidents, which are then borne by the community at large. The ability of communities and individuals to seek redress through the courts are likely to be limited by difficulties in identifying the beneficial owners of vessels, particularly in a globalised industry.

3.24 The costs to individual seafarers and communities from inadequate implementation of existing international regulations have been well documented and publicised. The costs of a single major pollution incident, for example, can run into hundreds of millions of dollars. As parts of the regulation were introduced in response to specific incidents and failures of individual operators to maintain safe and environmentally responsible shipping practices, there is little reason to believe a non-regulatory approach would see all shipping operators voluntarily adopt sufficient levels of responsibility to avoid or reduce major risks.

3.25 This option is not considered viable in light of the considerable political and community interest in addressing the problems of substandard shipping and protection of the marine environment.

Self-regulation

3.26 Industry could develop and administer its own Codes of Practice or similar arrangements based around the issues covered in the existing legislation. Typically under self-regulation an organised industry group regulates the behaviour of its own members. It implies that firms in the industry or members of a profession have accepted mutual obligations.²⁹ Self regulation works well in some industries, but depends on factors such as the size and structure of the industry, the ease of entry and exit, the ease of containing externality effects (e.g. environmental impacts) and the coverage of the industry by reputable industry bodies.

²⁹ Office of Regulation Review (1998) A Guide to Regulation

3.27 It also depends on the level of acceptance internationally where an industry is trading outside the national jurisdiction. Market problems which best suit self-regulation relate to inadequacies of information, eg where information provided by a company may be misleading, where consumers are unable to evaluate it, where the costs of misinformation are high or where providing it is costly for firms.

3.28 Self-regulatory codes are generally not appropriate where enforcement mechanisms are inadequate or they have the potential to be used as anti-competitive tools. For this reason, self-regulation is most effective in mature concentrated markets or where consumers are mainly repeat purchasers. In a concentrated industry it is easier for consumer interest groups or competitors to highlight breaches of the industry code. If a market comprises mainly of repeat purchasers, customers can penalise firms diverging from the code by taking their business away.³⁰

3.29 These conditions are unlikely to be present in the Australian shipping market. There is no suitably effective international shipping industry body and no acceptance of mutual obligations. There is extensive participation in the industry by foreign operators and crews. While some sectors of the shipper community may comprise a small number of large repeat purchasers, there is still a wide demand across industry for shipping, much of which is concerned more about price and timeliness than the safety of the ship or its operational practices.

3.30 The international community has rejected self-regulation in shipping and has put in place a regulatory system based on the treaties negotiated through the IMO. Submissions from government agencies, the shipping industry and unions have also rejected self-regulation. Self-regulation is not considered a viable alternative for Australia.

Quasi-regulation or Co-regulation:

3.31 Under this option governments influence industry to comply with a range of rules, standards and other instruments, but these do not form the basis of explicit government regulation. These might include government endorsed industry codes of practice, guidance notes, government-industry agreements and national accreditation schemes.

3.32 Co-regulation usually refers to industry developed and administered arrangements, backed by government legislation enabling the arrangements to be enforced. Both quasi- and co-regulation also require a coherent industry body and acceptance by all industry participants of some mutual obligation to comply. Neither exists in the international shipping industry.

Unilateral Domestic Legislation

3.33 Australia could develop its own set of regulatory standards for the shipping industry, sufficient to meet particular Australian concerns. Regulations could be tailored to Australian circumstances, which may reduce or increase barriers to competition or costs of compliance according to particular issues.

³⁰ Office of Regulation Review (1993) Recent Developments in Regulation and its Review.

3.34 The international regulatory framework is provided by the ship safety and marine environment protection conventions negotiated and put in place under the auspices of the IMO. With the exception of the United States, very limited unilateral national legislation for ship safety and marine environment protection has been enacted around the world. The US has been able to introduce unilateral legislation, such as OPA 90³¹ for specific environmental purposes, because of its market power that enables it to ensure that foreign shipping wishing to trade with the US complies with US law.

3.35 It would be possible for Australia to also introduce operational requirements that differ from those already in force internationally. Even if standards were implemented at essentially the same level as international treaties in effect, there would be additional compliance costs for the international industry in identifying and meeting Australia's requirements. If unilateral action by Australia was more expensive to comply with than multilateral legislation, shipping lines could choose not to trade with Australia, with very little cost to themselves. Those shipping companies that decided to continue to trade with Australia could minimise or reduce their costs by reorganising their corporate structures so that ships visiting Australia would be owned by a separate company for which the ship was its only asset. In this circumstance, unilateral national legislation may not guarantee that risks from sub-standard shipping would be any lower than under current legislation.

3.36 As a large user of international shipping, it is in Australia's interests to influence international standards that can be applied to foreign ships through its participation in relevant international forums and through multilateral approaches towards global standards. A unilateral approach to regulation would undermine Australia's standing and leverage in international forums.

3.37 The unilateral option is not considered viable for a small economy such as Australia. The international regulatory regime which is already in place, and given effect through the *Navigation Act 1912*, provides the most certainty and effectiveness for Australia in addressing the problems of sub-standard ships and marine environment protection, and for business it offers the most cost-effective means of compliance with safety and environmental standards in a globalised industry.

National legislation based on international agreements:

3.38 This option reflects the existing contents of the *Navigation Act 1912*, which largely give effect to Australia's international maritime convention commitments.

3.39 The review has concluded that the broad direction of national legislation based on international instruments is a valid approach to the identified problems. Alternatives to government regulation are considered impractical, as the recognition, implementation and acceptance of alternative regimes are not sufficient to achieve the desired safety and environmental outcomes in the international shipping industry.

³¹ The US *Oil Pollution Act 1990*, which was a legal requirement for phasing out single hull tankers in US waters. The European Commission is now considering introduction of an absolute age limit on single hull tankers following the *Erika* disaster and oil spill.

3.40 The international community has rejected non-regulation and self-regulation in shipping and has put in place a regulatory system based on international treaties. Against this background, the Australian shipping industry has indicated its support for a national regulatory system based on internationally agreed regulations.

3.41 Within this option, however, scope exists for formulating regulations in a variety of ways, from the highly prescriptive form currently used to a performance and outcomes based approach. Regulation using performance based, “duty of care” concepts also may encompass elements of quasi- or co-regulation where appropriate, but essentially it provides for a legally enforceable approach to ensure persons engaged in the shipping industry meet their obligations.

Alternative or Non-regulatory Measures

3.42 Other than direct regulation, possible policy responses to market failures include:

- reliance on common or civil law,
- requiring adequate insurance, and
- improving the availability of information to enable customers to make more informed decisions.

3.43 Each of these responses can deal with a subset of the market failures identified by Savage, as summarised in Table 3.1:

Table 3.1 Matrix of Market Failure and Legal and Policy Responses

<i>Market Failure</i>	<i>Liability</i>	<i>Insurance</i>	<i>Information</i>		<i>Direct Regulation</i>
			<i>Outputs</i>	<i>Inputs</i>	
Imperfect information	X	-	X	X	X
Myopia	-	X	-	X	X
Customer Rationality	-	-	-	-	X
Third Parties	X	-	-	-	X
Bilateral crashes	X	-	-	-	X

Source: Savage, I (1999) Economics of Commercial Transportation Safety

Common or civil law

3.44 Longstanding arrangements and case law in the shipping industry provide for legal liability to be attached to carriers whose actions adversely affect shippers and third parties. These liabilities are contained in several provisions of the *Navigation Act 1912*, such as the liability of the master and owner for a ship involved in an incident even where the vessel is under pilotage. The carrier therefore bears both the costs of preventing incidents as well as the costs of compensation for damage caused by incidents. In theory this enables carriers to make informed decisions on optimal levels of safety to supply.

3.45 In practice however, there are limitations to the legal liability solution. International shipping law and practice provides for shipping operators to limit their liabilities in many circumstances. Such limitations are evident in the *Carriage of*

Goods By Sea Act 1991, the *Limitation of Liability for Maritime Claims Act 1989*, which are both based on international convention obligations, as well as some sections of the *Navigation Act 1912*. Any compensation payable is due after the fact of damage and may not fully compensate for all losses. Some costs, for example, are not legally recoverable, such as loss of future profits, delayed production or claim administration.

3.46 In some cases, community concerns about intangible costs faced by third parties can be valued much higher than would be the case in voluntary assumptions of risk between a carrier and consignor of goods. This is particularly evident in considering environmental impacts, which arguably have led the push for extended government regulation to control impacts of shipping.

Insurance

3.47 As ship owners could declare bankruptcy or “disappear” to avoid paying large legal settlements, governments have legislated to require that carriers hold insurance to cover their liabilities. In Australia this is achieved through the *Marine Insurance Act 1909*.³² As well, the *Protection of the Sea (Civil Liability) Act 1981* requires owners of oil tankers carrying more than 2000 tons of oil in bulk as cargo to maintain insurance to specified limits to cover the costs of oil pollution incidents. This legislation gives effect to Australia’s commitments under the International Convention on Civil Liability for Oil Pollution Damage. The Commonwealth Government also has committed to introducing legislation requiring vessels to provide proof of adequate P&I insurance or other insurance to cover pollution clean up costs.³³

3.48 Shippers of oil as cargo are required to contribute to a compensation fund under the *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – General) Act 1993* and associated customs and excise levy acts, which give effect to Australia’s obligation under the International Oil Pollution Fund Convention 1992. The maximum coverage available from the Fund is US\$180 million, which can easily be exceeded by the costs of remediating a major oil spill.

3.49 Insurance benefits third parties by ensuring that victims have access to compensation even where a ship owner may avoid individual liabilities. It benefits individual carriers by pooling the risks of an incident across the industry, and to some extent helps the carrier to improve knowledge of risks through the size of insurance premiums. However, insurance is not a perfect method of internalising costs for the low standard operator. Insurance companies themselves may have imperfect knowledge, particularly where a carrier is concealing information that may increase the risks of an incident occurring. Insurance also typically only covers a portion of the full costs of an incident.

³² The *Marine Insurance Act 1909* was referred to the Australian Law Reform Commission for review and report by December 2000, to reflect contemporary practices and technologies in shipping and insurance industries, and to remove potential restrictions on competition.

³³ Commonwealth of Australia (1998) *Australia’s Oceans Policy – Specific Sectoral Measures*

Better Information

3.50 If complete information on the safety record of particular ships and companies is available to customers and port State authorities, better decisions could be made on chartering or cargo consignment choices. In theory at least, consignors of cargo could exercise a moral responsibility to only select carriers who meet at least minimum safety requirements, as well as taking informed decisions about the security of their cargoes and the impact on cargo insurance premiums, rather than just relying on price.

3.51 Port state and harbour authorities also would be able to better target high risk ships, both through safety audits, educational campaigns and enforcement activities. Cost savings in enforcement from better targeting would be passed back to the shipping industry, particularly to the better operators, through reductions in levies that pay for safety inspection and enforcement programs.

3.52 This is the rationale behind current arrangements to gather and publish more widely Port State Control information, which identifies the ships, companies, classification societies and flag States of substandard vessels. Australia shares its Port State Control information widely with other regulatory authorities under the IMO's Tokyo and Paris Memoranda of Understanding on Port State Control. The information is published on the Internet so that companies and cargo interests can also make judgements about the ships they deal with. Other organisations also provide information on ship quality. For example, the European Commission's Equasis website publishes and provides public access to ship information searches, including details on ship safety and quality, human elements, complaints, fatigue, collective bargaining agreements, false certificates and non-compliance with IMO and other international conventions.³⁴

3.53 Legislation enabling the conduct of Port State Control inspections is necessary to enable the data to be gathered. Legislation also requires all safety and pollution incidents to be reported and provides for the causes of incidents to be investigated and reported to improve knowledge and understanding.

3.54 There is also a growing trend among shipping agents and cargo interests to publish through commercial ship booking services more information on ship safety records as well as commercial matters. Some shipper or ship chartering companies include standard clauses in their contracts requiring the ship to show evidence of compliance with relevant international conventions.

3.55 The above range of policy alternatives need to be seen as a complementary suite of responses, rather than as substitutes for each other. The fact that all or some of these alternative mechanisms exists is not a reason for governments not to directly regulate behaviour. Each mechanism has a role to play in achieving the objectives of enhancing safety and environmental outcomes. Together they can provide incentives for industry to perform at least at the minimum required standards. In isolation, their effectiveness is much reduced.

³⁴ Lloyds DCN, *Crew Details on EQUASIS website*, 29 May 2000, p12. See also <http://www.equasis.org>.

Impacts of regulation on competitiveness and efficiency

3.56 There are significant difficulties in quantifying the costs and benefits of any restrictions on competition in the legislation or of alternative measures, particularly in matters of safety and environmental protection where estimates will vary considerably according to predictions of risk and assumed valuation of life and the environment.

Nature of Costs

3.57 Costs of regulation comprise the costs of:

- building and maintaining a ship to the relevant standards;
- inspection, compliance audit and survey certification;
- training and wages of crews;
- supplies and equipment; and
- insurance and ship registry.

3.58 Notwithstanding the difficulties in estimating costs, the OECD has estimated that the minimum application of internationally agreed safety standards imposes a cost burden of around 13-15% of ship operating costs.³⁵ Over a world trading fleet of about 19,000 vessels this represents around US\$4 billion per year, equivalent to around A\$350,000 per vessel per annum. An alternative industry estimate places the costs of minimum standards to annual ship ownership at around 5%.³⁶ As ship operating costs represent approximately a third of total ownership costs,³⁷ the industry estimate is in the same region as the OECD estimate.

3.59 For major trading vessels in the Australian fleet, this would approximate A\$20 million per annum. An additional A\$20 million per annum could be incurred for vessels in the offshore and minor trading fleet, if it is assumed similar orders of costs applied to such vessels. Other vessels trading to Australia would also be required to incur similar levels of costs, although it is not possible to estimate from available information the total of these costs.

3.60 The costs of administering safety and other regulations under the *Navigation Act 1912* are reflected in the levies charged to the shipping industry by AMSA to perform these functions. In 1998-99, the Regulatory Functions Levy amounted to \$16.1 million.

3.61 Additional compliance costs to business may arise where Australian standards exceed or differ from those prescribed internationally, or where unnecessary duplication exists across or within Commonwealth and State/Territory jurisdictions. Apart from a few anecdotal examples, the review has not been able to separate or quantify the extent of such costs. Other intangible or unquantifiable costs may arise from lost opportunities to participate in the shipping industry by persons or businesses who do not meet the prescribed standards, and legal fees, fines and other costs associated with ship detentions or prosecutions for breaches of regulations.

³⁵ OECD (1999)

³⁶ Drewry Shipping Consultants Ltd (1998)

³⁷ The Shipping Reform Group (1997) estimated that for the Australian fleet operating costs represents about 35% of total costs.

3.62 The costs of fines or ship detentions, however, are not additional to the costs of meeting required standards. These costs arise because vessels do not meet the standards. They are therefore costs of the alternative option of taking a risk that a vessel will not be inspected and detained or prosecuted. The OECD estimates that there is a substantial difference in costs of meeting minimum international standards and likely costs of detention and rectification of problems as a result of inspection. This difference can equate to daily running cost savings that are a significant percentage of total operating costs.³⁸ It is this differential that gives an economic incentive for owners to reduce spending on safety measures, and which needs to be addressed through government interventions.

Nature of Benefits

3.63 Similarly, the benefits to the community are not directly evident or readily quantifiable, but they do exist and need to be considered. Benefits will depend on whether, in the absence of regulatory requirements, any market failure would occur. Market failures do occur in many areas of economic activity, and there is considerable historical and contemporary evidence that they will continue to do so in the shipping industry. The costs to individual seafarers and the community as a whole of even a single incident can be so severe as to outweigh the costs to industry or individuals of meeting regulatory requirements.

3.64 Benefits of regulation include:

- Safety of individuals, through reductions in risk of death or injury to crew, passengers or third parties, savings in search and rescue expenses and savings in medical, hospital and rehabilitation costs;
- Protection of property, through reduced loss and damage to vessels, cargoes, public infrastructure and third party property;
- Reduced delays to vessels, cargoes and passengers and other maritime infrastructure users;
- Environmental benefits from savings in pollution damage to marine life and other marine ecological resources;
- Reduced public administration costs from habitat remediation and clean-up costs, reduced needs for mitigation equipment and response expenditure;
- Reduced losses to recreational and other community amenity;
- Reduced losses to other industries such as tourism, fisheries, aquaculture and others dependent on marine resources;
- Enhanced commercial reputation of shipping and related businesses and of individuals engaged in shipping.

3.65 These benefits are extremely difficult to quantify. Some examples serve to illustrate the potential scale of benefits of regulation:

- The number of injuries to Australian seafarers has fallen steadily since 1994, with estimated savings in compensation and rehabilitation costs of A\$3 million;
- The OECD estimated the total loss of a fully laden bulk ore carrier with crew could impose economic costs in excess of A\$60 million. On this basis, losses of bulk carriers carrying Australian cargoes in the period 1989-91 potentially represented A\$546 million per year;

³⁸ OECD (1996)

- Marine insurance claims in 1998 produced a loss ratio of 152% for Institute of London Underwriters members, on claims of 1.6 billion pounds sterling. In the hull class, the loss ratio was 176% on claims of 957 million pounds sterling. Most losses occurred in the bulk carrier market. It was estimated that in 1999 underwriters also would find it very difficult to make a profit.³⁹
- Ship detentions have fallen from 9.6% of ships inspected in 1995 to 5.3% in 1999, or from 244 vessels to 145, saving in delays to ships and cargoes. Delay costs for ship owners or charterers due to detention in 1999 are estimated to be around A\$2.5 million.⁴⁰
- The 1999 *Erika* oil pollution incident reportedly has imposed remediation costs around US\$150 million. The costs of a pollution incident could be many times greater if it occurred in an area of high environmental sensitivity and economic value, such as the Great Barrier Reef.

3.66 Despite the difficulty in quantifying costs and benefits of regulation and alternatives, the review concludes that it is clear in the minds of the international community and the shipping industry that the benefits of a regulatory regime based on international standards outweigh its costs.

3.67 The optimum level of transportation safety cannot be left simply to market forces between carriers and their passengers or shippers, as is evidenced by the long history of government regulation of safety in all forms of transport in around the world.

3.68 Within the existing framework of regulation, there is scope for improved efficiency and for reducing unnecessary compliance costs for industry. While the impact of more diligent regulation and enforcement, as well as adoption of new technologies, has been improved levels of safety and environment protection over the past decade, there is still an unacceptably high level of ship defects and detentions. More emphasis needs to be placed on human behaviours, particularly the commitment of ship owners and operators to preventing problems from occurring in the first place.

3.69 Adoption of a performance based approach is consistent with trends in other areas of international and domestic safety regulation and represents a recommended “best practice” approach. When all parties involved in shipping operations, including shore based management and personnel, adopt a safety culture, it can be expected that accidents and incidents should reduce. This will benefit shipping and cargo interests directly, including financiers, insurers, owners and operators. Crews will also benefit from reduced risks of death or injury, and the general community benefits from reduced risks of loss or damage to life, property and the environment.

3.70 The adoption of performance based regulation within Australian shipping law, with reference to relevant international or national standards, should provide sufficient flexibility for businesses to meet their obligations in a way that suits their individual operations and minimises compliance costs. It also provides the flexibility

³⁹ Lloyds List, 27 April 1999, *Insurers see rise in vessels lost at sea*

⁴⁰ Based on an average delay per detention of one day and charter rate of US\$25,000 per day for a container ship, US\$10,000 for a Panamax size bulk carrier and US\$ 6-7,000 for a Handymax size bulk carrier. Information from AMSA Port State Control reports and Australian Shipping Federation.

and incentive to encourage innovation and improve safety and environmental performance.

3.71 Performance based regulation is not without its costs, however. Industry is required to work harder at identifying and implementing measures to address safety and environmental hazards. In some cases this will require more effort and costs for businesses in developing appropriate procedural arrangements, investment in equipment and training of staff. While larger companies and those engaged in development of new technologies in the shipping industry will have the skills and resources to address these requirements, smaller companies may prefer to use standard guidelines that save them the costs of developing their own approaches. Regulations should continue to provide guidance to assist smaller operators to meet their obligations under performance based standards.

3.72 The Act also needs updating to remove provisions that duplicate or contradict general laws on workplace relations or cover matters now part of the social welfare system. The aim is to treat the shipping industry as far as possible as other industries governed by the common workplace relations legislative regime and to remove provisions from the Act that are redundant in light of modern administrative and legal practice. Matters that are not directly related to the prime objective of ship safety and marine environment protection should be repealed or relocated in more appropriate legislation wherever possible.

3.73 Rationalisation of official reporting requirements and reducing paperwork requirements of shipping regulation offers substantial opportunity for reducing the costs of compliance for business. Official reporting requirements should be examined jointly by AMSA and the industry to assess scope for further reductions or aggregations of reporting requirements, opportunities for reporting in common formats and for using available electronic technologies for transmitting the required information to authorities. The objective should be to ensure that to the maximum extent possible, the burden of reporting is kept to the minimum necessary consistent with international convention obligations and the purposes of the legislation.

Chapter 4 The Maritime Regulatory Framework

A Multilateral Approach to Shipping Regulation

4.1 The *Navigation Act 1912* primarily covers Australian trading ships engaged in international and domestic interstate trade and certain operations of foreign flag trading ships in Australian waters. Recent decisions by the Australian Transport Council support the realignment of the Commonwealth's powers to regulate shipping to more closely reflect coverage of vessels that trade, or are likely to trade, internationally.

4.2 To the extent that Australian ships are trading overseas, they must have a means of demonstrating they are fit for the purpose of international ocean travel and the carriage of goods. When arriving in foreign ports, ships will be subject to the relevant countries' Port State control regimes and risk detention if they cannot demonstrate their compliance. Similarly, when foreign flag ships trade into Australia, we require some means of assessing their standards for safety and environmental protection purposes.

4.3 Australia's powers to regulate shipping are subject to the provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS)⁴¹. This convention defines the internationally agreed responsibilities and jurisdictions of Flag States, coastal States and Port States, and provides the framework for more detailed technical conventions and agreements under the International Maritime Organisation and the International Labour Organisation.

4.4 Broadly, UNCLOS provides for the primary responsibility for regulation of ships to rest with the Flag State, particularly where a vessel is operating on the high seas (Art. 92). Flag States have duties under Article 94 to ensure safety at sea of vessels flying their flags and to conform to generally accepted international regulations, procedures and practices. Flag States also are obliged to adopt laws for the prevention of pollution by ships flying their flag that are consistent with generally accepted international rules and standards adopted through the competent international organisation (Art 211).

4.5 Coastal and Port States have certain rights to regulate ships of other Flag States in their territorial seas and international straits in order to protect the safety of maritime traffic and infrastructure, and to protect the environment, natural resources and security. Such regulations applying to the design, construction, manning or equipment of foreign ships must be consistent with generally accepted international rules or standards (Arts. 21.2 and 42). Foreign ships are required to comply with all such laws and all generally accepted international regulations relating to the prevention of collisions at sea. (Arts. 21.4 and 39). Under Article 24, a coastal state shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage or would discriminate between foreign or national flag shipping to or from or on behalf of any State.

4.6 Many important rules and procedures in maritime law are elaborated in international forums and contained in international instruments. Specific port State

⁴¹ Department of Foreign Affairs and Trade (1994)

powers originate from IMO conventions and, to a lesser extent, in ILO treaties. These include:

- Article 218 of UNCLOS
- Article 21 of Load Lines Convention 1966
- Article 2, regulation 19 of Chapter 1 of the SOLAS Convention 1974
- Article II(3), regulation 19 Chapter 1 (annex) of the Protocol of 1978 to the SOLAS Convention
- Article 5(2) of MARPOL 1973
- Article X of Regulation I/4 of STCW 1978
- Article 4 of the Merchant Shipping (Minimum Standards) Convention ILO147
- Article 1 of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties

4.7 It is a basic rule of international law that conventions are binding on States which have become a party to the conventions, once those conventions have entered into force. As Australia has ratified most of the international conventions governing shipping, including UNCLOS, Australia has an obligation to give effect in national law to the relevant matters. Australian legislation and case law for shipping also lies in the mainstream of international law and practice.

4.8 As an island nation, Australia's national well-being depends to a large extent on access to competitive, efficient and effective shipping services. In agreeing to ratify certain conventions, including UNCLOS, Australia has given recognition to the fact that shipping is a truly international business that requires international cooperation in finding appropriate regulatory solutions to issues such as safety, environmental protection and certain commercial matters. The industry benefits through having a common set of standards and mutual recognition of compliance that operates across multiple national jurisdictions. It is important for foreign ships trading to Australia to know what requirements Australian authorities are likely to impose in interpreting IMO conventions. Consistency of standards and enforcement regimes reduces industry's costs in ascertaining and complying with different standards in different national jurisdictions.

4.9 As well, Australia has recognised the dominance of foreign ships in servicing our international trading partnerships. Given the extent of Flag State responsibilities for ship safety and environmental protection, it is in Australia's interests to encourage international acceptance of common standards that meet Australia's needs for these matters, and agreement internationally on means of encouraging compliance with those standards. Regulation based on multilateral agreements also provides benefits to the Australian authorities in terms of internationally recognised benchmarks for regulation and enforcement actions.

4.10 In the absence of strong enforcement of standards by some foreign Flag States, and given the limitations of direct powers to regulate standards aboard foreign ships, the Port State Control and detention powers, are a powerful incentive for foreign ship operators to comply with recognised standards for vessels, crews and operations.

4.11 Submissions to the review have consistently supported the need to maintain an internationally consistent approach to shipping regulation, including a strong Port State control regime.⁴²

4.12 Shipping is a vital service to Australia's international trade. To facilitate trade, Australian businesses need to use ships that operate in an integrated international regime. If Australia does not adopt an internationally based approach, Australian shippers face the prospect of interruptions to trade, as it would be more difficult and costly for ships to demonstrate compliance with differing national regulatory arrangements. Australian ships trading overseas would also face additional costs and difficulties in securing contracts if they cannot readily demonstrate compliance with internationally accepted safety requirements.

4.13 Having accepted the need to adopt various international agreements affecting shipping, Australia has clear obligations to implement the terms of those agreements it has ratified. It is also in Australia's interests to take advantage of internationally accepted measures to protect its interests as a coastal and port State where it is clear other flag states are unable or unwilling to meet their obligations.

The International Regulatory Framework

4.14 Because of its international nature, and the traditional philosophy of the freedom of the seas, it is difficult for one nation acting alone to establish a regulatory regime that effectively enhances international ship safety and protection of the environment.

4.15 As previously noted, the international regulatory regime comprises the UN Convention on the Law of the Sea 1982 (UNCLOS), supported by a range of international instruments developed by the competent international bodies, which in the case of shipping are principally the International Maritime Organization (IMO) and the International Labour Organization (ILO).

4.16 Australia has ratified most of the international maritime conventions governing shipping, including all of the important safety related conventions. Those conventions applied by the *Navigation Act 1912* are listed in Tables 4.1 and 4.2.

4.17 The IMO has issued guidelines to flag States for the implementation of IMO instruments⁴³ which identify the requirements of national legislation to effectively apply the following conventions:

- The International Convention for the Safety of Life at Sea (SOLAS) 1974;
- The International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- The International Convention on Load Lines (LL) 1966; and

⁴² For example, Submission Nos 3, 11, 13, 16, 17, 20, 21, 23, 25, 31, 35, 44. General support for this approach was also given in industry workshops in Melbourne, 10 September 1999 and Sydney 22 September 1999.

⁴³ International Maritime Organization (1997)

- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978.

Table 4.1 International Maritime Organization Conventions Ratified by Australia

Title	Date Ratified
International Convention for Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW)	7 November 1983
International Convention on Load Lines, 1966 Load Lines (LL) and Protocol of 1988	29 July 1968 7 February 1997
International Convention for the Safety of Life at Sea 1974 (SOLAS), and Protocol 1978 Protocol 1988, including adoption of the ISM Code.	17 August 1983 17 August 1983 7 February 1997
Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS)	29 February 1980
International Convention on Tonnage Measurement of Ships, 1969 (Tonnage)	21 May 1982
International Convention on Salvage, 1989 (Salvage)	8 January 1997
International Convention for Safe Containers, 1972 (CSC) and Amendments of 1993	22 February 1980 14 August 1995
International Convention for the Prevention of Pollution of the Sea by Ships 1973/78 (MARPOL) Optional Annex III Optional Annex V	14 October 1987 10 October 1994 14 August 1990

Table 4.2 International Labour Organization Conventions Ratified by Australia

Title	Date ratified
7. Minimum Age (Sea) 1920	28 June 1935
8. Unemployment Indemnity (Shipwreck) 1920	28 June 1935
15. Minimum Age (Trimmers and Stokers) 1921	28 June 1935
16. Medical Examination of Young Persons (Sea) 1921	28 June 1935
22. Seamen's Articles of Agreement 1926	1 April 1935
27. Marking of Weight (Packages Transported by Vessels) 1929	9 March 1931
57. Hours of Work and Manning (Sea) 1936	24 Sept. 1938
58. Minimum Age (Sea) (Revised) 1936	11 June 1992
69. Certification of Ships' Cooks 1946	29 August 1995
73. Medical Examination (Seafarers) 1946	29 August 1995
76. Wages, Hours of Work and Manning (Sea) 1946	25 January 1949
92. Accommodation of Crews (Revised) 1949	11 June 1992
93. Wages, Hours of Work and Manning (Sea) (Revised) 1949	3 March 1954
109. Wages, Hours of Work and Manning (Sea)(Revised) 1958	15 June 1972
133. Accommodation of Crews (Supplementary Provisions) 1970	11 June 1992
137. Dock Work 1973	25 June 1974
166. Repatriation of Seafarers (Revised) 1987	29 August 1995

4.18 These guidelines also recognise the need for provisions governing the requirements for foreign ships in waters under the jurisdiction of the flag State, ie the exercise of Port State and Coastal State powers as identified under UNCLOS. As well as setting out the powers and responsibilities of the authorities and standards for vessel construction and operation, the guidelines suggest national legislation should identify the duties of the owner/operator, the master and the crew.

4.19 Under the provisions of UNCLOS and the above conventions, national administrations are required “to give effect to the conventions in national legislation and for taking all other steps which may be necessary to give these instruments full and complete effect so as to ensure that, from the point of view of safety of life at sea and protection of the marine environment, a ship is fit for the service for which it is intended.”⁴⁴

4.20 Consistent with UNCLOS Article 94 and the relevant provisions of IMO conventions, a flag State should promulgate laws which permit effective jurisdiction and control in administrative, technical and social matters over ships flying its flag, in particular providing the legal basis for general requirements for registries, the inspection of vessels, safety and pollution prevention. The legislation should also provide the basis for the flag State’s enforcement of national laws including associated impartial investigative and penal processes.

4.21 Convention arrangements recognise that national administrations may authorise other organisations to act on their behalf when conducting surveys and inspections of vessels and issuing certificates of compliance, and they provide for consistent documentation of agreements with such organisations to ensure that the convention requirements are met. The conventions also generally recognise that there will be cases where national administrations wish to supplement the convention requirements with their own national requirements, such as for occupational health and safety, health standards, manning levels, working hours and language.

4.22 Recognition is also given to adoption of an alternative standard to that contained in IMO conventions. For example, SOLAS Chapter 1, Regulation 5 provides that a national administration may allow any other fitting, material, appliance or apparatus or any other provisions to be made for a ship if it is satisfied by trial that such alternatives are at least as effective as that required by the present IMO regulations. Any administration that so allows a substitution from the regulation requirements is obliged to provide to the IMO details of any substitutions and a report on any trials.

4.23 The international maritime regulatory regime is already extensive in its coverage, and is constantly evolving, both in its extent and in the way in which international regulation is now being approached. Until recently, regulations promulgated by the IMO have been very prescriptive and were predominantly focussed on the technical aspects of ship design, maintenance, equipment and operation. More recently the IMO has been moving towards an outcomes and performance based approach.

⁴⁴ International Maritime Organization (1997) Annex 1, p3

4.24 In recent years the IMO also has recognised the need to focus more on the human factors that contribute to safety and pollution prevention before they become critical. Formal Safety Assessment techniques have been identified as a more effective method of rule-making than traditional prescriptive methods. The trend towards a greater focus on human behaviours began with the development of the International Safety Management (ISM) Code and the revised STCW Convention.

The Australian Regulatory Framework

The Offshore Constitutional Settlement

4.25 Jurisdictional responsibility for shipping is divided between the Commonwealth and the States/Northern Territory under the Constitution. There are limits to the direct constitutional powers for the Commonwealth to regulate shipping, and the balance of legislative competence rests with the States.

4.26 The Commonwealth derives its responsibilities for shipping under the various heads of power under s51 of the Constitution which may concern shipping. Two of the most important are the s51(i) interstate and overseas trade and commerce power and the s51(xx) corporations power. The external affairs power (s51(xxix)) also is of considerable importance as this is the basis for division of Commonwealth and State authority over the seas around Australia.

4.27 The High Court in 1975 found that “sovereignty over Australia’s territorial sea, including the subjacent subsoil and the superjacent airspace, is vested in the Crown in right of the Commonwealth”.⁴⁵ The Court found that the Commonwealth had legislative power over what lay beyond the low water mark of the States under its external affairs power, excluding States’ internal waters.

4.28 This decision presented the Commonwealth with practical administrative difficulties, as it had no wish to assume responsibility for matters it considered were more appropriately handled at the State level. It also was not clear how States’ internal waters should be determined and it was not considered desirable to wait for the courts to determine the matter on a case by case basis.

4.29 The solution was negotiation with the States of the Offshore Constitutional Settlement (OCS) in 1979, covering a range of matters in which the Commonwealth agreed to share powers with the States.⁴⁶ The OCS resulted in Commonwealth legislation conferring on the States and Northern Territory title in and powers over coastal waters.

4.30 The Shipping and Navigation Agreement under the OCS provided for sharing of powers concerning shipping based on the nature of the voyage being undertaken, rather than a ship’s location at any particular time or whether or not it is engaged in commerce. It was agreed that the Commonwealth would be responsible for:

- trading vessels proceeding on an interstate or international voyage;
- fishing vessels proceeding on an overseas voyage;
- ships belonging to the Commonwealth or a Commonwealth authority;

⁴⁵ Davies and Dickey (1990) p32

⁴⁶ Attorney-Generals Department (1980)

- navigation and marine aspects of offshore industry mobile units (at the time mainly drilling vessels), but *Navigation Act 1912* requirements may be displaced by directions or conditions of instruments issued under *the Petroleum (Submerged Lands)* legislation.
- offshore industry vessels (mainly supply craft), other than those confined to one State and its adjacent area. *Petroleum (Submerged Lands) Act 1967* requirements are capable of displacing the Commonwealth's *Navigation Act 1912* requirements as in the case of mobile units. The owner/operator may seek a declaration by AMSA that the *Navigation Act 1912* applies to a particular vessel to facilitate its operation in more than one State or Territory.

4.31 The States and the Northern Territory are responsible for trading ships on intrastate voyages, fishing vessels, pleasure craft and inland waterways vessels.

4.32 Simultaneously with the negotiation of this agreement, the Commonwealth and States developed a Uniform Shipping Laws Code, which was initially published in the Commonwealth of Australia Gazette on 28 December 1979. This Code, including its subsequent amendments, is used as the basis for consistent Commonwealth, State and Northern Territory legislation for the survey and manning of commercial vessels, including fishing vessels, and was intended to minimise problems that would otherwise occur in the implementation of the agreement on shipping and navigation. The Code is currently being reviewed by the National Marine Safety Committee.

4.33 The Shipping and Navigation Agreement also recognised that increasingly the regulation of shipping and navigation was being developed at the international level and considerable importance was placed on the need for Australian requirements to reflect the latest international standards. In implementing particular maritime treaties it was acknowledged that it may be desirable to depart from the shipping and navigation arrangements outlined above and the agreement provides for this.

4.34 An example is the Convention on the International Regulations for the Prevention of Collisions at Sea 1979, which was ratified by Australia following the enactment of the *Navigation Amendment Act 1979*. The Act enabled State law to apply the international regulations to all ships in the territorial sea and internal waters and provided for the necessary Commonwealth law to apply the international regulations to ships outside the 3 nautical mile limit.

4.35 Separate from the Shipping and Navigation Agreement, the OCS also foreshadowed the introduction of legislation to create a register of Australian ships (the *Shipping Registration Act 1981*), to replace the provisions of the *Merchant Shipping Act 1894* under which ships then were registered in Australia as "British ships". Internationally, Australia is obliged to fix the conditions for the grant of its nationality to ships.⁴⁷

4.36 The OCS also recognised that the initial division of responsibilities between the Commonwealth and the States in the field of ship-sourced marine pollution came about in 1960 when Australia accepted the International Convention for the

⁴⁷ The *Shipping Registration Act 1981* was reviewed in 1997 as part of the Commonwealth's legislation review schedule under national competition policy.

Prevention of Pollution of Sea by Oil 1954. Effect was given to the Convention by the enactment of Commonwealth legislation which applied to Australian ships outside the territorial sea, and similar legislation passed by the States which applied to all ships within the territorial sea.

4.37 In the interests of cooperative federalism, it was agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands* case in 1975 should be continued. It was agreed that the Commonwealth should prepare legislation which implemented the provisions of the International Conventions relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 and Civil Liability for Oil Pollution Damage 1969. In implementing the latter convention, a saving clause was inserted to allow States to legislate to implement certain aspects of the convention if they wish to do so.

4.38 Part VIIA of the *Navigation Act 1912* then included provisions for intervention by the Commonwealth authorities in cases of pollution or threatened pollution by oil from ships. This Part also imposed civil liability on shipowners whose ships carry oil in bulk as cargo. Similar legislation exists in some of the States. This Part has since been replaced by the suite of Protection of the Sea legislation introduced in the early 1980s. Other than certification of some ship-board equipment and operational aspects, the current *Navigation Act 1912* now does not implement the marine pollution prevention, response and liability requirements of international conventions.

4.39 By 1997 the Australian Transport Council recognised that the above division of shipping powers has resulted in some difficulties in administration and caused unnecessary confusion for business and duplication of regulatory activity and costs. Ministers agreed in 1999 to a re-arrangement of jurisdiction over trading ships based on the size of vessels.

4.40 Under the agreed amendments, the Commonwealth will be responsible for safety regulation of:

- all foreign trading ships in Australian waters other than vessels under 500 Gross Tons on intrastate voyages;
- all Australian trading ships proceeding on an overseas voyage;
- all Australian trading ships of 500 Gross Tons or more proceeding on voyages in Australian waters.

4.41 Submissions to this review have generally supported the realignment of jurisdiction based on vessel tonnage as a sensible move that will improve the clarity and efficiency of safety regulation for industry.⁴⁸ The review also strongly supports the proposed revised arrangements.

4.42 A further constitutional consideration is s109, which provides that where Commonwealth and State laws are inconsistent then the Commonwealth law prevails to the extent of any inconsistency.

⁴⁸ For example, Industry Workshops, Melbourne 10 September 1999 and Sydney 22 September 1999, and Submission Nos. 13 and 16

4.43 State and Northern Territory marine safety laws generally apply to the relevant ships operating within coastal⁴⁹ and inland waters, although in some cases the law is expressed as applying to any ship connected with the relevant State and to any ship operating in State waters. This application of State law is valid where the operation of a vessel affects the “peace, order and good government” of a State, and where the law is not inconsistent with Commonwealth law. It is also subject to the proviso in the OCS and s4 of the *Coastal Waters (State Powers) Act 1980*, retaining for the Commonwealth the right to ensure the observance of international law, including the provisions of agreements binding on the Commonwealth.

Commonwealth Legislation

4.44 The division of shipping powers described in the OCS is reflected in s2 of the *Navigation Act 1912*, which was inserted in 1980. This section describes the ships to which the Act does not apply. The Act thus applies to all other ships, including those that do not fit the descriptions in s2.

4.45 It is the *Navigation Act 1912* which puts into effect in Australian law all of the international ship safety conventions and some labour conventions concerning seafarers. The Act covers inter alia construction standards, survey of ships, safety of ships, crewing, seafarers’ qualifications, welfare and discharge of seafarers, cargoes and passengers. Most of the detailed regulations concerning shipping are implemented through Marine Orders made under s425 of the *Navigation Act 1912*.

4.46 The Act has an extensive history and has been modified many times to take account of emerging technologies and developments in national and international regulation. A summary of the development of the Act is at [Appendix A.3](#).

4.47 The *Navigation Act 1912* does not address all shipping matters regulated by the Commonwealth. A list of other Commonwealth regulations directly affecting shipping activities is at Table 4.3, excluding general community wide taxation, industrial relations and companies legislation. This list demonstrates the extent and complexity of modern maritime legislation. To this list must be added the full range of State and Territory legislation that complements the matters covered in the Commonwealth law.

Recommendations:

1. Australia should continue to base its regulation of shipping and port state control on international agreements.
2. Commonwealth shipping legislation should continue to support the Australian Transport Council’s decision to redefine Commonwealth and State/Territory authorities’ jurisdiction over trading ships based on tonnage rather than area of operation.

⁴⁹ Under the OCS, the States were given responsibility out to 3 nautical miles. When the Commonwealth subsequently extended the territorial sea to 12 nm, however, the limit of States’ title and powers was not also extended and remains at 3 nm.

Table 4.3 Commonwealth Legislation Affecting Shipping

<u>Ship Operations</u>	Navigation Act 1912 Lighthouses Act 1911 Occupational Health and Safety (Maritime Industry) Act 1993 Seafarers' Rehabilitation and Compensation Act 1992 Radiocommunications Act 1992 Submarine Cables and Pipelines Protection Act 1963 Great Barrier Reef Marine Park Act 1975 Petroleum (Submerged Lands) Act 1967
<u>Commercial Matters</u>	Admiralty Act 1988 Carriage of Goods by Sea Act 1991 Limitation of Liability for Maritime Claims Act 1989 Fisheries Management Act 1991 Marine Insurance Act 1909
<u>Marine Pollution</u>	Ballast Water Research and Development Funding Levy Act 1998 Ballast Water Research and Development Funding Levy Collection Act 1998 Protection of the Sea (Civil Liability) Act 1981 Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Customs) Act 1993 Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Excise) Act 1993 Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – General) Act 1993 Protection of the Sea (Powers of Intervention) Act 1981 Protection of the Sea (Prevention of Pollution from Ships) Act 1983 Quarantine Act 1908
<u>Other Environment Protection</u>	Antarctic Treaty Act 1960 Antarctic Treaty (Environment Protection) Act 1980 Environment Protection and Biodiversity Conservation Act 1999 Environment Protection (Sea Dumping) Act 1981 Historic Shipwrecks Act 1976 Protection of Moveable Cultural Heritage Act 1986
<u>Economic</u>	Bass Strait Sea Passenger Service Agreement Act 1984 Bounty (Ships) Act 1989 Ships (Capital Grants) Act 1987 Navigation Act 1912, Part VI Port Statistics Act 1977 Trade Practices Act 1974, Part X Trans-Tasman Mutual Recognition Act 1997
<u>Taxes and Levies</u>	Customs Act 1901 Marine Navigation Levy Act 1989 Marine Navigation Levy Collection Act 1989 Marine Navigation (Regulatory Functions) Levy Act 1991 Marine Navigation (Regulatory Functions) Levy Collection Act 1991 Protection of the Sea (Shipping Levy) Act 1981 Protection of the Sea (Shipping Levy Collection) Act 1981 Sea Installations Act 1987 Sea Installations Levy Collection Act 1987 Seafarers' Rehabilitation and Compensation Levy Act 1992 Seafarers' Rehabilitation and Compensation Levy Collection Act 1992
<u>Registration</u>	Shipping Registration Act 1981
<u>Administrative</u>	Australian Maritime Safety Authority Act 1990 Border Protection Legislation Amendment Act 1999 Coastal Waters (Northern Territory Powers) Act 1980 Coastal Waters (Northern Territory Title) Act 1980 Coastal Waters (State Powers) Act 1980 Coastal Waters (State Title) Act 1980

Table 4.3 Cont'd

Control of Naval Waters Act 1918
Crimes at Sea Act 1979
Crimes (Ships and Fixed Platforms) Act 1992
Migration Act 1958
Seas and Submerged Lands Act 1973
Transport Legislation Amendment (Search and Rescue Service) Act 1997

5. OBJECTIVES OF THE LEGISLATION

5.1 The terms of reference for the review require, *inter alia*, that the review team will clarify the objectives of the Act and their appropriateness in terms of objectives for modern shipping regulation.

5.2 In keeping with legislative drafting style at the time of its introduction, the *Navigation Act 1912* has no explicitly stated objectives and its purposes must be inferred from its content. Modern drafting principles require that legislation has clearly stated objectives, which can be used to evaluate the need for and performance of the legislation.

5.3 The existing *Navigation Act 1912* is an omnibus Act covering a diverse range of matters, with a broad range of implied purposes.

5.4 The principal features of the Act derive from concerns about the historically high loss rate of ships and crews in earlier centuries and into the early part of the 20th century. Poor working conditions for seafarers also contributed to high rates of death and injury among crew and the spread of diseases. The first attempts to address these losses came through classification societies and marine insurers and were developed as industry-based commercial practices over many years prior to legislation. Intervention by governments was seen as necessary to build on and reinforce these rules, as industry based arrangements were still clearly failing to reduce the number of casualties.

5.5 The Act originated from British legislation of the 19th century, which drew together the then principal features of safety regulation. It has been added to over the years to include more recent international developments in regulation of ship safety, which often have arisen in response to continued accidents involving shipping and significant loss of life. These arrangements also reflect more modern concerns about pollution of the marine environment. Not only has the absolute volume of shipping increased over the years, but ships are now significantly bigger and carry a wider range of hazardous and noxious cargoes.

5.6 These concerns are still relevant to contemporary circumstances and are likely to remain so well into the future. There is increasing demand from communities worldwide for more effort to protect the marine environment from pollution from all sources, including shipping. Improvement in the safety of ships and their operations is critical to reducing the risk of a major pollution incident.

5.7 This objective is supported by most shipping organisations and government agencies making submissions to the review.⁵⁰ Several submissions supported a more explicit objective of giving effect to Australia's flag State responsibilities under international maritime conventions, codes and agreements⁵¹. Such an objective would be somewhat narrower in its effect than the recommended objective, and would not for example provide specific national requirements for regulation of safety and environment protection. It could also be argued that implementation of international

⁵⁰ Submissions 1, 2, 11, 13, 16, 17, 20 and 22.

⁵¹ Submission Nos 1, 13 and 17.

convention obligations is the mechanism by which Australia will meet the proposed objective, rather than being the objective itself.

5.8 The Act also includes a range of provisions that provide for settlement of disputes about commercial matters or liability in the event of loss or damage involving shipping. These matters also grew out of international commercial practices over many years, with the objective of facilitating international trade. It is in the interests of trade that ships and their cargoes are not unduly held up while disputes over such matters are settled in courts. To some extent, developments in general commercial law and trade practices now provide a facility to alternatively regulate some commercial relationships and dispute settlement. However, some arrangements are well ingrained in international shipping law and practice, and it would be inconsistent and inefficient for Australia to adopt different procedures to those adopted worldwide.

5.9 Further features of the Act are the protection of Australian seafarers from exploitation and shipping companies from “unfair” trade by lower cost foreign ships. Protection of seafarer working conditions on Australian ships also has its origins in British 19th century legislation that was aimed at overcoming the then hazardous and exploitative working environment of seafarers. It was considered necessary to provide seamen with legislative protection from unscrupulous employers who might seek to take advantage of seamen who were illiterate and itinerant.

5.10 To a significant extent these conditions no longer exist on Australian ships, and many aspects of the contemporary working environment are now covered by modern occupational health and safety or community wide workplace relations legislation. Some aspects, however, remain as potential safety issues, or lie outside community based legislation as they relate to the unique aspects of shipping. The Department of Health considers that the legislation should ensure that ships’ crews have at least an internationally accepted standard of accommodation, food, water and medical care, and that passengers are provided with standards of facilities and services to ensure clean accommodation, safe food preparation and handling, effective sanitation and competent medical care.⁵²

5.11 Other submissions supporting continued protection of seafarers through shipping legislation included Dr Michael White, Queensland University, seafarer welfare organisations, the National Bulk Commodities Group/Minerals Council of Australia, McCullough Robertson Lawyers, and the Maritime Union of Australia.⁵³ The Department of Employment, Workplace Relations and Small Business submitted that the ILO recognises the unique characteristics of shipping through separate conventions for seafarers, and the inclusion in shipping legislation of provisions implementing those conventions ratified by Australia is an appropriate way for Australia to demonstrate its compliance with the conventions.⁵⁴

5.12 The *Navigation Act 1912* also regulates coastal trade for the purposes of ensuring licensed vessels meet prescribed conditions, whilst allowing for unlicensed vessels to operate when no suitable licensed ship is available and it is considered to be

⁵² Submission No.25

⁵³ Submission Nos 10, 14, 15, 16, 23, 29, 31

⁵⁴ Submission No. 43

in the public interest. These arrangements, commonly called cabotage, were introduced to protect Australian coastal shipping from unfair competition from foreign ships, to ensure a supply of trained seamen and ships in time of war and to secure communications and trade.⁵⁵ A further claimed purpose of regulation of coastal trade was to protect the wages and conditions of Australian seafarers by limiting access to the trade. There has been considerable confusion in the past about the interaction of coastal trading regulation in Part VI and the employment provisions of Part II of the Act.

5.13 The economic regulation of the coasting trade currently covered by Part VI of the Act serves a distinctly different policy objective from other Parts of the Act and does not easily fit with its core purposes. There is a strong preference in industry submissions that economic regulation of the coastal trade should be separated from the *Navigation Act 1912* to provide for a clear indication of the Government's policies for shipping safety and environment protection on the one hand and economic regulation on the other.

5.14 The Australian Shipping Federation submitted that "Matters of commercial and economic regulation ... should be covered in other legislation or simply subsumed in other relevant legislation."⁵⁶ The National Bulk Commodities Group and the Minerals Council of Australia supported separation of economic from technical components of the regulations, noting they "are sufficiently diverse in application to warrant separate Acts".⁵⁷

5.15 The NBCG and MCA also only partially supported an economic objective. The economic objective should be concerned with providing security of access to internationally competitive shipping services. Economic regulation of maritime services should not specifically respond to the objective of creating and maintaining an Australian merchant marine or to ensure Australia has available a fleet of modern vessels to carry critical supplies in time of national emergency. The NBCG and MCA argue that these objectives relate to national interest considerations and, as necessary, should be implemented without imposing commercial barriers to accessing competitive shipping services.⁵⁸

5.16 McCulloch Robertson Lawyers submitted that Part VI of the Act should be removed because it deals with policy with respect to the Australian shipping industry as distinct from regulation.⁵⁹

5.17 The Maritime Union of Australia submitted that economic regulation of coastal trade is not inconsistent with the core objectives of the Act, as it also serves a social purpose and that shipping legislation must maintain a holistic approach. It stated that a principal reason for the introduction of the *Navigation Act 1912* was to build up a mercantile marine through protection of Australian ship-owners against unfair competition from subsidised foreign ships and/or poorly paid crews from other

⁵⁵ Parliament of the Commonwealth of Australia (1924) Report of the Royal Commission on the *Navigation Act 1912*.

⁵⁶ Submission No.13, p3

⁵⁷ Submission No.16, p4

⁵⁸ Submission No.16, p7.

⁵⁹ Submission No.23, p3

countries. It considered that it is not acceptable to remove regulation of coastal trade to separate legislation.⁶⁰

5.18 The policy need to continue or discontinue economic regulation of coastal trade is outside the terms of reference of this review and is being considered by Government in the context of the reports of the Shipping Reform Group and the Shipping Reform Working Group. To the extent that it is necessary to continue to regulate coastal trade, however, it would be appropriate for this to be done through separate legislation. This would enable a clearer distinction to be drawn between government policies for economic purposes and those designed to address safe operations of ships and their crews, and there would be a clear separation of administrative responsibility between AMSA and the Department of Transport and Regional Services.

Recommendations:

3. The principal objectives of the legislation should be to:
 - (a) enhance ship safety and protection of the marine environment;
 - (b) facilitate international shipping trade;
 - (c) provide conditions for seafarers consistent with safe operations and that reflect particular industry characteristics.
4. The Act should not include an objective for economic regulation of coastal shipping.

⁶⁰ Submission No. 74

6. GENERAL POLICY PRINCIPLES

6.1 The international nature of the shipping industry suggests that an international approach must be taken towards its regulation if safety and pollution prevention measures are to be successfully implemented.

6.2 The keys to effective regulation of maritime safety are a rigorous form of national designation (Flag State), strict commitment by the designating country to internationally agreed standards and effective monitoring and similar commitment by other countries. The need for compulsory universal safety standards that businesses can choose to exceed if they wish has been endorsed by the Productivity Commission for international aviation, based on a similar regime.⁶¹

6.3 Action by port and coastal states are essential to address the problems introduced by the some Flag States which are unable or unwilling to effectively enforce internationally accepted regulations. The growth in use of open registries and the mechanisms used within some registries have diluted the effectiveness of traditional national (Flag State) regulation of ship standards. Ownership and crewing of vessels have become more truly globalised and it can be difficult for a Flag State to identify and prosecute a substandard operator, particularly where the owner or management agencies are located offshore and where less-reputable shipping companies may quickly disappear and reappear elsewhere. Port State controls have evolved to fill the enforcement gap and, where Flag State implementation is inadequate, will remain an essential part of any national regulatory scheme for international shipping.

6.4 In Australia, the historically small Australian –owned fleet means a heavy reliance on foreign shipping services to meet our trading needs. With foreign ships carrying more than 95% by volume of our exports and imports, the emphasis in modern shipping regulation must be on application of internationally agreed standards to these ships, as well as to the Australian fleet. The principal basis for development of an appropriate international regime is the International Maritime Organization (IMO), supplemented as appropriate by the work of the International Labour Organisation (ILO) in areas of crew health and safety.

6.5 In recent years the IMO has recognised the need to focus more on the human factors that contribute to safety and pollution prevention. Formal Safety Assessment techniques have been identified as a more effective method of rule making than traditional prescriptive methods. The trend towards a greater focus on human behaviours began with the development of the STCW Convention 1995 and the IMO International Safety Management (ISM) Code. These trends should be reflected more strongly and clearly in the revised *Navigation Act 1912*.

6.6 Both the management ashore and the ship's master and crew bear responsibility for the effective operation of their ship's safety management system. This is a fundamental tenet of the International Safety Management Code, which was adopted in 1993 to provide an international standard for the safe management and operation of ships and for pollution prevention. Its objectives are to ensure safety at

⁶¹ Productivity Commission (1999) Review of International Air Service Agreements

sea, prevention of human injury and loss of life and avoidance of damage to the environment.

6.7 This approach recognises that different sectors of the industry will have different operational characteristics, and that safety solutions are best targeted towards the individual operations of a company, within the broad framework of internationally agreed obligations and responsibilities. The principle adopted by the review is that regulations should be framed in such a way as to require parties involved with shipping to meet their duties and responsibilities for safe and environmentally responsible operations, while recognising the differences in their individual operational circumstances.

6.8 The adoption of performance based regulation, with reference to relevant international or national standards, should provide sufficient flexibility for businesses to meet their obligations in a way that suits their individual operations and minimises compliance costs. It also provides the flexibility and incentive to encourage innovation.

6.9 The Maritime Union of Australia submitted that performance based standards need to be assessed in the light of the need for extensive regulation to maintain the marine environment and safety of seafarers. It does not support a move towards a less prescriptive emphasis in the pursuit of flexibility.⁶²

6.10 When the *Navigation Act 1912* was originally enacted, one of its primary purposes was to protect seafarers who were unskilled and engaged largely on a casual basis. A number of provisions in the current Act have their genesis in that era. Since then, general legislation has evolved governing employment protection measures, occupational health and safety and social welfare. The Act needs updating to remove provisions that duplicate general laws on occupational health and safety and workplace relations or cover matters now part of the social welfare system.

6.11 The aim is to treat the shipping industry as far as possible as other industries governed by the common workplace relations legislative regime and to remove provisions from the Act that are redundant in light of modern administrative practice. Matters that are not directly related to the prime objective of ship safety and marine environment protection should be repealed or relocated in more appropriate legislation. However, there are a few of these provisions that do not conveniently belong in any other legislation and it is proposed that these be retained in a separate Part of the Act.

6.12 There also are a number of conventions of the International Labour Organisation dealing specifically with the employment of seafarers. While Australia could rely on generally applicable laws to implement some of these international standards, it is appropriate for the Act to continue giving effect to Australia's obligations under these conventions. Both the Attorney-General's Department and the shipping industry⁶³ submitted that it is more appropriate for users to have shipping specific requirements included in the Act.

⁶² Submission No. 74

⁶³ Submission No 44 and industry workshops, Melbourne 10 September 1999 and Sydney, 22 September 1999.

6.13 Internationally agreed measures have also arisen over many years to address a range of commercial and liability relationships involving shipping. These arrangements have been adopted to facilitate trade by providing some certainty to ship operators in the way disputes may be settled and to avoid unnecessary delays in shipping movements. An example is the treatment of division of loss in the event of a shipping incident involving more than one ship. Several of these measures are reflected in the *Navigation Act 1912*. It would be counter to the efficiency of the industry and the competitiveness of Australian trade if such provisions were to be repealed in advance of any changes to international law and practice in these areas.

6.14 A number of industry submissions to the review commented on the extent to which standards in the Act and certain Marine Orders exceed those prescribed by international conventions.⁶⁴ For example, BHP Transport⁶⁵ estimated that Australian interpretation of international standards adds \$350,000 per ship to ship construction costs. The Australian Mines and Metals Association commented that the intermingling of industrial and safety provisions leads to confusion and additional costs for industry.⁶⁶

6.15 In some cases, the standard adopted in Marine Orders may reflect Australian community standards that are more than minimum international requirements. In other cases the international convention requires interpretation when it is implemented in domestic legislation, and the Marine Orders again interpret the standards in light of Australian community standards. The legislation should recognise that while it is desirable to base Australian regulations on international arrangements, there needs to be some flexibility in interpretation of or additions to the international minima where this is considered necessary to reflect Australian community expectations.

6.16 The UK Marine and Coastguard Agency (MCA) is reviewing its regulations to align requirements more closely with international agreements. Its aim is to ensure that it should be no more onerous to comply with UK regulations than for any other reputable flag. The UK MCA has been working with industry to eliminate regulations in excess of international requirements. However, where such standards are considered to make a significant contribution to safety or environmental outcomes, these will be pursued at the IMO with a view to their eventual adoption by the international community.⁶⁷ This is a sound policy approach, which also should be adopted by Australia.

⁶⁴ For example, Submission Nos 7, 16, 17, 30, 35, 36, 38

⁶⁵ Submission No. 35

⁶⁶ Submission No. 38.

⁶⁷ Submission No. 19

Recommendations:

5. The legislation should be underpinned by the following general principles:
 - (a) Continued emphasis on consistency with internationally recognised regulations through Flag State responsibilities and strong Port State controls;
 - (b) Greater emphasis on the human factors and individual responsibilities for building a culture of safety and environmental awareness in shipping operations;
 - (c) Greater emphasis on performance based standards with more flexibility for businesses to define their own strategies to meet safety outcomes;
 - (d) Avoiding distortions in the shipping market through regulation;
 - (e) Treating shipping in the same way as other businesses to the maximum extent possible for employment and commercial matters; and
 - (f) Making specific provision for a small range of employment and commercial matters that reflect the particular circumstances of shipping.
6. Australia should continue to retain regulatory standards in Marine Orders that reflect Australian community expectations where these make a significant contribution to safety or marine environmental protection. Where appropriate, Australia also should promote higher standards at IMO for international adoption.

7. STRUCTURE OF THE LEGISLATION

7.1 A common criticism of the *Navigation Act 1912* is that it is difficult to follow and to determine exactly what requirements are applied to particular ships. Much of the confusion arises because the Act addresses a wide range of matters affecting shipping, with a mixture of objectives that affect different groups of ships. The Act also implements a range of international conventions, some of which apply to all ships and some only to Australian ships. Convention requirements in some cases are applied through pre-existing provisions of the Act that are used to demonstrate compliance with the convention, but which do not explicitly reference the convention. The differing drafting styles of the many amendments to the Act also add to difficulties of interpretation and consistency.

7.2 Industry submissions to the review generally support clearer presentation of matters within the Act and the convenience of having the totality of ship safety and related regulation in one piece of legislation.⁶⁸ This is seen as providing easy reference for smaller operators and foreign shipping companies seeking access to, and understanding of, their obligations under Australia's regulatory system. The Attorney-General's Department also prefers to retain the linkages between the various provisions of the Act, but indicates that modern drafting techniques can improve clarity and accessibility through use of outline sections, explanatory boxes and reference notes.⁶⁹

7.3 However, the Act presently does not deliver a "one stop shop" for all shipping related legislation. There is a significant body of shipping regulation already in separate enactments, including the economic regulation of international liner shipping conferences, shipping registration, marine pollution from ships and the liability regime for related damage or loss (see Chapter 4).

7.4 There also are several aspects of shipping which can be regulated by general community based legislation. Industry submissions to the review supported the regulation of employment relationships with ships' crews, where possible, by general workplace relations legislation and workplace agreements. The *Navigation Act 1912* should only provide for employment-related matters that impinge on safety (such as crew qualifications and safety manning requirements) or are peculiar to the shipping industry (such as special powers of the ship's master to preserve the ship and life at sea). A number of other provisions concerning commercial relationships may also be handled under general fair trading or other legislation or civil law.

7.5 Nevertheless, there is a clear preference to avoid significant further disaggregation of the contents of the Act. The structure of the legislation, however, needs to be more clearly aligned with its core purposes. This would allow for a more appropriate grouping of matters to enable easier interpretation and application of the Act and better understanding of its obligations by the maritime industry.

⁶⁸ Submission Nos. 7, 11, 13, 23, 35, 38, and Melbourne workshop 10 September 1999

⁶⁹ Submission No. 44

Primary and Subordinate Legislation

7.6 New legislation to replace the *Navigation Act 1912* should take the form of primary legislation that sets out the broad principles and performance outcomes that the legislation is intended to achieve. These should include reference to the provisions of international conventions, codes and regulations that it is intended to have effect in national law. It should also prescribe the principal offences and penalties and allow for regulations or Marine Orders to be made as subordinate legislation. The subordinate legislation should provide the detailed interpretation of international regulations applied by the Act and any other national standards.

7.7 Adoption of modern drafting styles may also improve clarity and ease of interpretation for industry. In particular, the legislation should be drafted in Plain English consistent with modern practice.

7.8 Earlier drafting styles required replication of the text of referenced standards in the Act to assist accessibility. In some cases copies of documents were only available from the international organisation concerned and access to updated copies may have been difficult and expensive for users. The text of international and national standards is now more generally available, particularly through the use of the Internet and publications by international bodies. It should suffice for the legislation to reference the appropriate conventions, codes or resolutions, and to allow for subordinate legislation to make necessary amendments as those standards are themselves amended.

Performance Based Regulation

7.9 The modern emphasis in ship safety regulation is on building a safety culture within the shipping industry that encompasses not only the ship and its crew but also the overall management system at sea and on shore. This centres on the ship owner/operator assuming primary responsibility for providing a management system that ensures compliance with all mandatory requirements for ship safety and protection of the marine environment as promulgated by the IMO conventions and the relevant national maritime administration.

7.10 The systems management approach has been adopted by the IMO in the International Safety Management (ISM) Code, which is part of the Safety of Life at Sea (SOLAS) convention. The Code recognises that good safety management requires commitment to and understanding of safety issues at all levels of ship operations, including owners, ship managers, classification societies and agents, as well as the master and crew. It provides for development of a safety management system by each shipping company to identify risks and provide appropriate safeguards, provide safe operating practices and a safe working environment, and to continuously improve safety management skills of personnel ashore and afloat. It is expressed in broad terms to recognise that ships operate under widely different conditions and to provide for flexibility in responding to individual needs.

7.11 A number of OECD countries, such as the United Kingdom, Canada and New Zealand, are developing contemporary national maritime legislation to reflect the safety systems approach of the ISM Code. Some industry sectors, such as the offshore

oil and gas industry in Australia and overseas, have been using safety case approaches to underpin safety management for several years. The safety systems approach also is similar to the duty of care system promulgated under modern occupational health and safety systems including the Commonwealth *Occupational Health and Safety (Maritime Industry) Act 1993*.

7.12 The Council of Australian Governments recommends⁷⁰ that regulations should be performance based, ie they should focus on outcomes not inputs. “Deemed to comply” provisions may be used where certainty is needed, with reference to standards or a range of standards deemed to comply with the performance outcome specified by the regulation. There should be no restriction on the use of other standards provided they meet the performance objectives.

7.13 The National Marine Safety Committee⁷¹ (NMSC) currently is reviewing the Uniform Shipping Laws (USL) Code as the basis for a common approach by Commonwealth, State and Territory Governments towards regulating smaller commercial ships including fishing vessels. It is developing a National Standard for Commercial Vessels reflecting the performance based approach. This approach represents best practice and the adoption of a similar framework for the *Navigation Act 1912* would promote consistency and facilitate a more seamless movement of vessels within the regulatory systems of the Commonwealth and the States.

7.14 Queensland adopted performance based legislation for marine safety in 1995, and has strongly endorsed this approach for providing industry with a flexible range of options for compliance, and fostering innovation and growth. The Queensland Department of Transport notes that the introduction of performance based legislation has been accompanied by a 17% reduction in safety incidents.⁷² The MIIU suggested that new legislation should limit prescription to the minimum consistent with Australia’s international obligations. The MIIU noted that there is a need to improve the safety culture of the industry, but that prescriptive regulation does not achieve this as it adds to regulatory overload and ambiguity or contradictory measures.⁷³ The Seafarers Rehabilitation and Compensation Authority also supported regulation that promotes accident prevention strategies and enhances the ability of authorities to perform inspection, advisory and educational functions for safety.⁷⁴

7.15 Most industry submissions to the review supported the adoption of performance based regulation that promotes development of a safety culture within industry, flexibility for industry in achieving safety outcomes and ensuring accountability through performance audits and monitoring by the regulator.⁷⁵ The Maritime Union of Australia supported a greater reliance on prescription to reduce

⁷⁰ COAG (1997) Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies. COAG comprises the Prime Minister, State Premiers and the Chief Ministers of the Northern Territory and the Australian Capital Territory.

⁷¹ The National Marine Safety Committee consists of representatives of Commonwealth, State and Northern Territory marine safety authorities. It was established in 1997 with the objective of harmonising marine safety standards across all jurisdictions.

⁷² Submission No. 37

⁷³ Submission No. 2

⁷⁴ Submission No. 28

⁷⁵ Submission Nos 11, 13, 16, 17, 30, 35, 36, 38, 40,

risk.⁷⁶ The MUA also had reservations about specification of duty of care that had an undue focus on common law duty of care concepts to the exclusion of on-going social responsibilities. It is concerned that ship operators would seek to avoid their responsibilities by placing the onus of duty of care on their employees.⁷⁷ Mc Cullough Robertson Lawyers supported a base level of prescription centred around international convention standards, as they considered it naïve to rely on industry to abide by codes of conduct or other self –regulation.⁷⁸

7.16 The review has proposed a form of performance based regulation that promotes a safety culture, acceptance of responsibility and ownership of safety issues within the industry by emphasising the responsibilities and duties of all parties engaged in shipping operations. It also would include an expanded range of audit and enforcement options for the Australian Maritime Safety Authority (see Chapter 27) designed to support and enhance development of the safety culture. This approach is consistent with concepts in contemporary occupational health and safety legislation, the direction now being taken in the IMO, as well as trends internationally and in other industries. The review specifically recommended against self-regulation.

7.17 The regulatory framework in the *Navigation Act 1912* should reference relevant international conventions, but leave the detailed standards or industry codes to be prescribed in Marine Orders. A degree of flexibility should be provided for industry to demonstrate compliance with these standards by alternative means where the conventions permit equivalence or exemption provisions.

Duties of Persons Connected With A Ship

7.18 The range of duties that should be specified is set out in Table 7.1. It would be consistent with the safety objective to apply these requirements to all Australian ships and to all foreign ships in Australian waters, to the extent permitted under international law.

7.19 The statement of duties aims to be as comprehensive as possible and to cover everyone who is involved in ensuring the ship is operated in a safe and environmentally responsible manner. The duty of care covers all those who influence risks to workplace health and safety, including employers, employees, designers, manufacturers, agents and suppliers of machinery and equipment, contractors and visitors to the work site. The duty is owed to all those who are exposed to risk, including employees, contractors, passengers, visitors and anyone near the workplace.

7.20 The focus on enforcement to achieve compliance is therefore reduced and instead all parties are encouraged to contribute to the ship safety and marine environment protection outcomes for which they are responsible both individually and collectively. A performance-based, co-regulatory system should require minimal punitive intervention on the part of the regulatory authority.

7.21 There have been suggestions that cargo and ship charter interests also have a responsibility to ensure that the ships they use should be seaworthy and compliant

⁷⁶ Submission No. 31

⁷⁷ Submission No. 74

⁷⁸ Submission No. 23

with all relevant international convention requirements, and that legislation should require charterers and cargo consignors to take all reasonable steps to meet this responsibility.⁷⁹

7.22 One option could be to apply to export charterers a similar obligation to that imposed on applicants for coastal voyage permits. The *Navigation Act 1912* indirectly recognises some responsibility of charterers and cargo interests for verifying ship quality through the coasting trade provisions in Part VI. Section 286 provides for the Minister to grant a coasting trade permit to an unlicensed ship where he is satisfied, inter alia, that it is desirable in the public interest that unlicensed ships be allowed to engage in the coastal trade. The Ministerial Guidelines⁸⁰ for granting permits provide that in the case of tankers and dry bulk vessels, the applicant for a permit is required to provide a satisfactory ship inspection report to meet the public interest test. In addition, the applicant must provide a letter from the charterer stating that the tanker is in a satisfactory condition to undertake the intended shipment or that the bulk carrier is believed to be suitable for the intended voyage on the basis of information provided.

7.23 There are three main forms of ship charter which provide differing levels of control over the operation of a ship. Under a bareboat or demise charter, the charterer has possession and control of the ship for a particular time period, usually measured in years, during which the charterer is responsible for its operation and crewing. Under a time charter, the charterer has the use of the ship for a specified time but the operation of the ship may be the responsibility of the owner/operator or the charterer depending on the nature of the agreement (charterparty). The voyage or spot charter covers a single voyage with the owner/operator remaining responsible for ship operations and crewing.

7.24 The terms of the charterparty impose responsibilities on the shipowner in that seaworthiness of the ship is an implied term of a charterparty. If no express provision is included in the charterparty, the shipowner is under an absolute obligation to deliver a ship to the time charterer that meets the required standard of seaworthiness and he remains liable even if he has exercised reasonable care. In this context, seaworthiness may include the competency and efficiency of the crew.⁸¹

7.25 Where a ship is time or demise chartered⁸², the chartering company may have effective operational control of the ship and would be expected to conform to the duties of the owner/operator specified in Table 7.1. The basic principle is to ensure each person who is capable of influencing the safe operation of the ship bears responsibility for his/her actions and decisions. This concept already is recognised in the ISM Code, which imposes responsibilities upon a “company” in relation to the implementation of safety management systems. The Code defines “company” as the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from

⁷⁹ Industry workshops, Melbourne 10 September 1999, Sydney 22 September 1999 and Perth 20 September 1999, and consultations with MUA 26 May 2000.

⁸⁰ Department of Employment, Workplace Relations and Small Business (1998) *Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping Trade*

⁸¹ Butler DA and Duncan WD, (1992) *Maritime Law in Australia*, Legal Books, Sydney

⁸² A ship that is either bare boat chartered by an Australian operator from a foreign owner or bareboat chartered out by an Australian owner to a foreign operator.

the shipowner and agreed to take over all the duties and responsibility imposed by the Code.

7.26 There also are varying degrees of involvement by charterers/cargo interests in verifying the quality of shipping carrying their cargo. Many charterers may just rely on a ship having valid certificates issued under international conventions as sufficient evidence that it is seaworthy and operated in a safe and environmentally responsible manner. However, some charterers/cargo interests, such as major oil companies and bulk loading terminals, independently verify that ships being considered for charter or using their loading facilities are in a satisfactory condition and are being operated safely by an appropriately qualified crew.

7.27 Charterers have access to sources of information about the quality of particular ships. Often the data base derived from independent ship vetting measures is shared between interests in the same trade. AMSA also maintains a comprehensive ship information data base that is available to any party with a valid interest in ship safety. The European Community's EQUASIS database aims to provide transparency of information relating to the quality of ships and their operators.

7.28 Commercial organisations also offer subscription to ship information services that include records of ship safety incidents and Port State Control records.

7.29 However, there are significant practical difficulties in expecting charterers or cargo consignors who are sending cargoes through freight forwarders to have much influence on whatever ship carries their cargoes. Some large enterprises which charter large shipping volumes do include in their contracts of charter that the ship owner must certify that the vessel is seaworthy and/or compliant with all international safety requirements. It would be unreasonable, however, to expect many smaller cargo interests to incur the additional costs of confirming the seaworthiness of the vessels that may carry their goods. Such a requirement could be expected to add significantly to costs of conducting their businesses and could be considered to be a restraint on competition. The costs are unlikely to be outweighed by the additional benefit to public safety or environment protection beyond that provided by direct safety regulation including ISM auditing and the port state control regime.

7.30 Some cargo interests⁸³ have questioned the subsuming of provisions relating to ship safety and crewing into the regulation of the coasting trade. They contend that Port State Control and AMSA's implementation of compliance measures contained in international standards provide the necessary and sufficient regulation for the safety of shipping and crews in Australian waters. This contrasts with union views⁸⁴ which maintain that the cabotage provisions are not solely in existence for economic regulation but also serving a social purpose.

7.31 The review considers that there is a substantial difference between the legislation imposing duties on charterers or cargo interests in relation to the safe and environmentally responsible operation of ships carrying their cargo and the legislation requiring charterers to certify that a ship is suitable for a coastal voyage. It would be impracticable to extend responsibility for ship safety and environment protection to

⁸³ Submission No. 16

⁸⁴ Submission No. 74

all cargo and charter interests. There also would be varying standards that a charterer/cargo interest would need to meet in discharging this responsibility depending on the type of contractual arrangement with the shipowner. Extension of responsibility to all charterers for ensuring the safety of the ship carrying their cargoes is likely to be opposed by much of the export industry and could undermine the current support among these parties for the Port State Control regime. Industry could argue that as they already would pay for ship inspection reports to satisfy themselves of the condition of a ship, it is unnecessarily onerous to duplicate the costs through additional Port State Control inspection.

7.32 If there are concerns about the quality of vessels being chartered, the review considers that a better approach would be to enhance the Port State Control inspection program by increasing the inspection rate and number of inspectors and by enhanced targeting of ships and companies. AMSA already is implementing better targeting by looking at the records of companies that charter ships of lower quality and increasing their inspection rates of such vessels. This issue is discussed further in Chapter 27.

Recommendations:

7. The primary legislation should focus on establishing the purpose of the legislation, prescribing the principles and performance outcomes required and significant duties, offences and penalties. Provision should be made to continue subordinate legislation to establish the detailed requirements and interpretation of the legislation.

8. The primary legislation should be performance based to encourage the development of a safety culture within the shipping industry and to provide flexibility to businesses in meeting their obligations.

9. The effectiveness of the proposed directions should be monitored through consideration of ship deficiency and detention rates in AMSA's annual Port State Control reports, supplemented by ongoing analysis of the causes of marine incidents and accidents by the Marine Incident Investigation Unit and of death and injuries to seafarers in AMSA's reports under the *Occupational Health and Safety (Maritime Industry) Act 1993*.

10. A stocktake of the effectiveness of the changes in regulatory approach should be conducted jointly by AMSA and the Department of Transport and Regional Services five years after amendments have been implemented.

11. The legislation should be reorganised into specific parts defined by the core purpose of enhancing ship safety and marine environment protection.

12. Matters that are specific to shipping should be retained in the legislation; however, the legislation cannot be a consolidated compendium of all shipping regulation.

13. The legislation should be drafted in Plain English and make use of appropriate aids to interpretation such as diagrams or explanatory boxes.

Table 7.1: DUTIES AND RESPONSIBILITIES OF PERSONS CONNECTED WITH A SHIP

A. Owner/Operator/Employers

- Ensure that all practicable steps have been taken to ensure safety of persons on and around a ship, consistent with requirements of the ISM Code of IMO.
- Ensure all relevant aspects of the ship, its equipment and crew comply with the certification requirements of the Act, Regulations and Marine Orders.
- Provide and maintain a safe working environment.
- Provide and maintain facilities, stores and equipment, sufficient for the intended voyage and use of the vessel, to ensure the safety and health of crew, supernumeraries and passengers.
- Systematically identify, eliminate and/or reduce as far as practical safety and environmental hazards on or near the ship (for matters under the owner's control).
- Develop procedures for safe and environmentally responsible operations and for handling emergencies.
- Investigate causes of incidents and take remedial actions to prevent re-occurrences.
- Provide all crew on board with reasonable/necessary information and adequate training to understand all identified hazards, adopt safe and environmentally responsible operating practices and emergency procedures.
- Involve crews in identification of operational hazards and development of safe and environmentally responsible operating and emergency procedures.
- Ensure persons on board have access to adequate medical treatment, food, water and accommodation to ensure their health and hygiene sufficient for the nature of the intended voyage.
- Repatriate sick, injured or distressed/shipwrecked employees to home port at owner's cost and meet all relevant medical attention bills and wages.
- Ensure a formal employment agreement is in force before taking a ship to sea and make suitable provisions for an employee to go ashore to seek advice or pursue a complaint.
- Maintain a record of employment and sea service and provide a copy to seafarer on request.
- Make suitable arrangements and account for the body and effects of any employee who dies in the course of a voyage, consistent with reasonable wishes of next-of-kin.
- Remove or mark wreck that is hazardous to life, safe navigation or the marine environment.

B. Master

- Has operational control over safety of the ship and persons and cargo aboard at all times that ship is in his care.
- May remove a person from duties if considered to have reasonable grounds to believe they are in any way endangering the ship, persons aboard or the environment.
- Has authority over all persons aboard, including crew, passengers, supernumeraries and stowaways for the safe and environmentally responsible operation of the ship.
- Has authority to refuse permission to anyone other than authorised officials to come or remain

aboard.

- Has authority to detain or restrain anyone aboard that would affect the safety or good order and discipline of the ship, using reasonable force as necessary, and a duty to hand over that person to an appropriate authority as soon as practicable.
- Responsible for compliance with requirements of Act, Regulations and Marine Orders.
- Comply with directions and instructions of the Australian Maritime Safety Authority or other authorised officials given under the Act, Regulations or Marine Orders.
- Report hazards at sea and assist ships and persons in distress.

C. Crew/Employees

- Take all practicable steps to ensure the safety of themselves and other persons on board, and the safe and environmentally responsible operation of the ship.
- Present as fit for duty and maintain fitness for duty at all stages throughout a voyage.
- Comply with requirements of the Act, Regulations and Marine Orders.

D. General

- All persons to hold relevant qualifications and/or documentation as required by the Act, Regulations and Marine Orders and not misrepresent their qualifications.
- All persons to comply with lawful requirements of the master to ensure safe and environmentally responsible operation of the vessel.
- All persons to comply with relevant inspection, investigation and audit requirements of the Act, Regulations and Marine Orders.
- All persons involved with consignment, loading, handling and stowing of cargoes to take all practicable steps to prevent damage or hazard to the ship and persons on or around the ship, loss of cargo or marine pollution by cargoes.
- A ship designer or builder or marine surveyor to ensure vessel and its equipment complies with the requirements of the Act, Regulations and Marine Orders.
- The owner and master of a ship must not operate or take a ship to sea unless the ship is safe.

E. Reporting

- Requirement to keep the official log book
- All persons to comply with all relevant matters required to be reported in the Act, Regulations or Marine Orders:

8. REGULATIONS AND MARINE ORDERS

8.1 Most legislation provides for the making of subordinate legislation as a means of enhancing the efficiency of operation. The primary legislation can be confined to the governing principles and essential features of the legislative regime, without the distraction of administrative detail. Subordinate legislation provides the detailed administrative requirements, particularly for matters that are expected to change frequently, such as specific bodies of standards or administrative arrangements. Subordinate legislation should not introduce significant matters of policy, significant impacts on individual rights and liberties, offences where penalties are imprisonment or fines in excess of \$1,100, administrative penalties for regulatory offences or procedural matter going to the essence of the legislative scheme.

8.2 The *Navigation Act 1912* provides in s425(1) for the Governor-General to make regulations prescribing all matters that are required or may be prescribed to give effect to the Act. Various other provisions also enable regulations to be made for specific purposes, which are listed in the attached table. There is some scope for these matters to be consolidated with the matters specified in s 425(1) under more general headings relating to the implementation of international conventions and safety in general.

8.3 A particular feature of subordinate legislation in the *Navigation Act 1912* is the power for the Australian Maritime Safety Authority to make Marine Orders. This system was adopted in 1980 as a means of expeditiously making changes to regulations. The system has operated satisfactorily since its introduction and represents a considerable improvement on the previous system of regulation making. It would be impractical to implement and update the volume of convention based rules and codes and other material for the management of ship safety and environmental protection without the ability to make Marine Orders. The flexibility available in Marine Orders enables the Authority to quickly adjust to changes in technology and other developments affecting matters subject to regulation under the *Navigation Act 1912*. There is strong and widespread support from stakeholders for the retention of the Marine Orders system.⁸⁵

8.4 Under s425(1AA), AMSA is empowered to make Marine Orders in respect of any matters in Parts II, III, IIIA, IV, V, VA, VB or XA for which regulations may be made, other than in relation to setting rates of penalties. Apart from penalties, other matters in the Act are capable of being regulated by Marine Orders. Marine Orders must be tabled in Parliament as disallowable instruments and are subject to scrutiny by Parliament. They are not valid until gazetted. There are currently 11 regulations and 47 Marine Orders in force.

8.5 AMSA publishes Marine Orders, which also are available on AMSA's Internet site, and copies can be obtained through subscription or purchase from AusInfo.

8.6 The Act presently contains a considerable amount of prescriptive detail. Much of this detail, including appendices setting out the text of conventions, is to give effect to a number of international conventions. In recent years, new Marine Orders have

⁸⁵ Industry workshops, Melbourne 10 September 1999, Perth 20 September 1999 and Sydney 22 September 1999. Submission Nos 3, 7, 13, 16, 23, 31, 35 and 37

duplicated much of this detail, particularly as the requirements of international instruments have evolved. The Act should be simplified by repeal of this duplication, and its provisions confined to a clearer statement of the conventions, or parts of conventions implemented by the Act. Details of these conventions can be identified in Marine Orders.

Review of Marine Orders

8.7 As Marine Orders also have the effect of imposing obligations and compliance costs on industry, it is appropriate that they also be reviewed against the same criteria as the requirements of the review of the Act. This will ensure that the scope and principles underlying the Marine Orders are consistent with the purpose of the legislation and that there is no excess regulatory burden on industry. A process has been established for the joint review of all Marine Orders by AMSA and the relevant industry associations – the Australian Shipping Federation (ASF) and the Australian Mines and Metals Association (AMMA), representing offshore vessel operators.

8.8 The joint review will apply the tests developed by the *Navigation Act 1912* review team at [Appendix A.4](#) to the Marine Orders, consistent with the *Navigation Act 1912* review terms of reference. The review of Marine Orders will be an on-going activity with the purpose of testing whether Marine Orders are still necessary and relevant to the objectives of the Act. It will also suggest ways to improve flexibility for industry in complying with regulations, as far as is practicable and consistent with international obligations.

8.9 The aim of the Marine Orders review is to adopt the performance based regulatory framework being proposed by the review of the Act. It seeks to remove as far as practicable the prescriptive detail that can be provided in the form of guidance notes or other reference material, rather than as mandatory requirements. There also may be elements in the Marine Orders that should be reflected in the primary legislation. For instance, the identification of duties by the review of various parties in relation to ship safety and marine environment protection should be stated in the Act.

8.10 The Marine Orders review process will allow more flexibility in compliance with Marine Orders to be introduced as the IMO reviews and updates its conventions. They will need to continue to provide for arrangements outside the detailed requirements of international conventions where these have equivalent or exemption provisions. These arrangements would provide for the overall safety objective of the convention to be met and for equivalents or exemptions to be subject to certain specific conditions.

8.11 The Marine Orders review will continue after the review of the Act has concluded. It is intended that its recommendations will be implemented in the redrafting of Marine Orders using the established process of industry consultation that allows relevant stakeholders to comment on changes before the Marine Order is promulgated. This is in line with Commonwealth Government regulatory policy which requires mandatory consultation with affected parties by all government agencies in developing legislative and regulatory proposals.

8.12 The Australian Institute of Marine and Power Engineers and the MUA expressed a strong interest in participating in the review of Marine Orders, with particular interest in areas of crew qualifications, accommodation, medical fitness and other matters relating to seafarer health and safety. The maritime unions already are included in AMSA's established consultative process.

8.13 Submissions have supported a review of Marine Orders. Several submissions commented that the content of Marine Orders is very prescriptive and needs review to assess the minimum requirements necessary to meet international standards and/or reducing any specific local community needs. It was suggested improvements could be made to Marine Orders by simply specifying references to recommended standards, clarifying the general nature of the international conventions, removing matters covered by a ships' ISM case, examining the continuing relevance of their content and priority to align more closely with international standards, and identifying matters that could be delegated to classification societies. A concern was expressed about the flexibility AMSA has in introducing new Marine Orders that add to industry costs. Submissions also supported fully involving industry and unions in the review processes.⁸⁶

Recommendations:

14. The legislation should continue to make provision for the Governor-General to make regulations in relation to penalties and incident investigations, and for AMSA to make Marine Orders on other matters.

15. The primary legislation should deal with the broad principles and desired outcomes, and other significant matters such as fees, and major offences or penalties.

16. Marine Orders should continue to deal with the detailed technical requirements of the legislation, including implementation of obligations under various international conventions and maritime safety in general.

17. Relevant codes of practice, standards or guidelines produced by the IMO, the National Marine Safety Council or other national standard setting bodies should be incorporated by reference into Marine Orders.

18. AMSA and the relevant industry associations should continue the review of Marine Orders in line with the review's proposed performance based regulatory framework so they are consistent with the primary legislation.

19. Marine Orders should continue to include the prescriptive elements of international conventions that are mandatory, but should be framed to allow flexibility within their exemption and equivalence provisions as provided for in the conventions.

⁸⁶ Submission Nos 3, 7, 10, 11, 16, 17, 21, 30, 31 and 38

Table 5.1: NAVIGATION ACT 1912 - PROVISIONS ENABLING MAKING OF REGULATIONS

SECTION	PROVISION
15	Qualifications of masters, officers and seamen.
124	Medical examination of, and issue of certificates of fitness to masters, seamen and persons proposing to engage.
134	<i>Medical Examination (Seafarers) Convention 1946</i>
136	Accommodation.
163A	Relief and maintenance of distressed seamen.
186D	Pilotage.
190B	Ship construction, surveys etc.
191	Regulations to give effect to the Safety Convention
171(6)	Signing of entries in ship's official log book
172A(2)	Manner and time of reporting the making of an entry in the official log book in relation to an occurrence.
186C	Qualifications of pilots.
190AB(2)	Manner in which survey information will be published.
192B	Carrying on a ship of stability information.
192C	Ensuring nuclear ships do not cause unreasonable radiation
193(3)	Exempting a ship from survey.
206	Testing watertight doors
206P	Extension of certificates.
215	Life-saving and fire prevention.
220	Load lines
224(4)	Circumstances in which Australian load line certificate may be cancelled or extended.
229	Signals of distress and urgency and their misuse.
231F	Radio installations
232	Compasses
240	Container Convention
253A	Carriage of dangerous goods.
257	Stowing and Carriage of cargo.
258	Measures to be observed for the prevention of collisions and use of on ships of lights and signals.
267A	Regulations of Annex I of MARPOL
267P	Regulation 13 of Annex II of MARPOL.
267ZC	Regulations 1 to 6 of Annex III of MARPOL.
267ZF	Regulations 3 and 11 of Annex IV of MARPOL
269E	Area of sea as a prescribed area.
269H	Position report or deviation report is to include prescribed information.
270	Passenger trade.
283A	Special purpose ships or special personnel.
283D	Offshore industry vessels
283 E	Offshore industry mobile units.
329C(2)	Salvage operations conducted by the government.
386J	Approvals by the Authority.
424(9)	Membership and operation of Marine Council.

9. JURISDICTION

9.1 A number of jurisdiction issues need to be addressed in clarifying the extent of the Act's safety regulation regime. These relate to Australia's powers under international law to regulate ships, the delineation between Commonwealth and State regulatory regimes, and the interaction between the *Navigation Act 1912* and related legislation.

International Jurisdiction

9.2 International law defines the navigational rights of ships in territorial waters and on the high seas and their obligations concerning ship safety and marine environment protection. The United Nations Law of the Sea Convention 1982 (UNCLOS) is the principal international instrument that defines the rights and duties of countries in relation to navigation of the sea and exploitation of its resources. As a signatory to the convention, Australia has a duty to give effect to its provisions in domestic law.

9.3 Submissions to the review have endorsed the approach taken by the UNCLOS convention which makes the Flag State primarily responsible for ensuring ships registered under its flag conform to generally accepted international safety and environment protection standards.⁸⁷

9.4 However, the industry also recognises that many Flag States have not been as diligent as Australia in implementing and enforcing international safety standards for ships registered under their flags. There were no submissions to the review opposing the need for a strong Port State Control regime and industry supports Australia continuing to pursue an active Port State role involving inspection of foreign ships visiting Australian ports to ensure that they:

- hold required certificates attesting to the ship's seaworthiness;
- have operationally effective on-board safety equipment and procedures;
- are transporting, storing and handling marine cargoes in a safe and environmentally responsible manner; and
- have crew members that are appropriately qualified and can fulfil their duties.

9.5 The review has identified situations where foreign vessels operate within Australia's claimed waters but do not visit an Australian port and presently are not subject to Port State Control inspections. These include ships:

- transiting Australia's territorial sea, including environmentally sensitive areas such as the Great Barrier Reef,
- conducting ship-to-ship transfers at sea or operating in the offshore oil and gas industry, including outside Australia's territorial sea but within the Exclusive Economic Zone (EEZ), and
- non-convention sized vessels in the offshore petroleum industry.

9.6 A number of submissions supported the observation that some ships are not effectively regulated at present and proposed that standards should apply equally to all

⁸⁷ Submission Nos 1, 11, 13, 16, 17, 20, 26, 35, 37, 44, and industry workshops in Melbourne 10 September 1999 and Sydney 22 September 1999

vessels in Australian waters, both Australian and foreign ships, both to improve safety and environment protection outcomes and to minimise competitive advantages obtained by sub-standard foreign ships.⁸⁸

9.7 The review proposes that national shipping legislation should aim to make full use of Australia's authority under international law to regulate ship safety and marine environment protection in relation to all vessels in the territorial sea and EEZ. Advice from the Attorney-General's Department suggests that this is essentially being achieved in the *Navigation Act 1912*.⁸⁹

9.8 The review notes with concern that this still leaves gaps in Australia's ability to effectively regulate some shipping operations within the EEZ, in part due to the constraints of international agreements on jurisdiction. One approach would be to pursue these matters at the international level for appropriate amendments to UNCLOS and shipping conventions that would enable a coastal state to take appropriate action to protect its marine environment by ensuring all foreign ships operating within its jurisdiction comply with the agreed minimum international safety and environmental protection standards.

9.9 In recommending this approach, the review notes that it would involve possible implications for the right of innocent passage and the free movement of ships. Considerable care will need to be taken to ensure that it is clear the proposed amendments are solely related to improving compliance with internationally agreed standards, and are not associated with economic regulation or trade issues. In view of the diplomatic and related processes involved in amending conventions, it should be recognised that this process would not yield quick solutions to the problems of unregulated and substandard ships.

9.10 In the interim, the review considers that the Department of Transport and Regional Services should explore further with the Attorney-General's Department whether there are any additional avenues for extending shipping legislation to fill these gaps. Examples could be the declaration of roadsteads for ship to ship transfers or the redefinition of the term "port" to include offshore installations. Similarly, the US Coast Guard regulates ship to ship transfers in the US oil import industry between 12 and 200 nm and in designated lighterage zones up to 60 nm from the coast.⁹⁰

Commonwealth/State Jurisdiction

9.11 Industry submissions generally supported the Australian Transport Council (ATC) recommendation that the Commonwealth should have clearer jurisdictional responsibility over Australian flag trading vessels over 500 gross tonnes voyaging overseas or on coastal routes and all foreign flag trading vessels in Australian waters.

9.12 The question has been raised whether this division of Commonwealth/State responsibility should be extended to other types of vessels of 500 GT or more, including fishing vessels, larger recreational craft and ships engaged in the offshore oil and gas industry. These vessels are excluded from the Commonwealth's regulatory

⁸⁸ For example, Submission Nos 6, 20, 29 and 35

⁸⁹ Attorney-General's Department, advice 8 February 2000

⁹⁰ Committee on Oil Spill Risks from Tank Vessel Lightering (1998)

regime unless they are a fishing fleet support vessel or fishing vessel proceeding on an overseas voyage, or a declaration is made for the vessel to come under the Commonwealth regime under s8A, 8AA or 8AB of the *Navigation Act 1912*.

9.13 The Attorney-General's Department has advised that the Commonwealth has constitutional power to comprehensively regulate all vessels beyond the low water mark.⁹¹ Under the Offshore Constitutional Settlement, State and Northern Territory governments have been given power to exercise control over ships in the adjacent territorial sea within 3 nautical miles. Consistent division of responsibility between Commonwealth/State regulatory regimes for all types of vessels, based on tonnage, would be more readily understood by industry. However, given the current division of responsibilities under the Offshore Constitutional Settlement, such a proposal would need to be progressed in the longer term through ATC and the Council of Australian Governments (COAG) processes.

9.14 ATC should be asked to consider extending its decision to re-base the Commonwealth's jurisdiction in relation to trading ships of 500 GT and over to fishing and offshore vessels of the same tonnage. The current arrangements (including the agreed amendments for trading ships as approved by ATC) should be reflected in Commonwealth shipping law until ATC has considered the matter.

9.15 The review notes that a number of its recommendations will affect State and Territory responsibilities. State and Territory authorities have raised concerns about the possible range of impacts on their jurisdiction, functions and resources, as noted in subsequent chapters. These matters will require substantial consultations with the States and Northern Territory. All such matters affecting jurisdiction should be examined comprehensively and a single set of recommendations made to the Australian Transport Council for consideration.

Interaction of Navigation Act and Occupational Health and Safety Legislation

9.16 The *Occupational Health and Safety (Maritime Industry) Act 1993* (the OH&S (MI) Act) refers to the *Navigation Act 1912* to define its coverage of Australian ships to which Part II of the *Navigation Act 1912* applies. The Department of Employment, Workplace Relations and Small Business (DEWRSB) has responsibility for occupational health and safety policy in industry generally and administers the OH&S (MI) Act. AMSA performs the inspectorate function under the OH&S(MI) Act. AMSA also relies on Marine Orders made under the *Navigation Act 1912* to facilitate implementation of regulatory matters rather than use the more complex regulation making power under the OH&S (MI) Act.

9.17 The Seafarers Safety, Rehabilitation and Compensation Authority, an agency in the DEWRSB portfolio, stressed the need for the regulatory environment for ships to be consistent with modern regulatory practice in occupational health and safety as adopted by the OH&S (MI) Act.⁹² This is based on the concept of duty of care of the employer to provide a safe system of work and the employee to work safely. NOGSAC also supported the concept that shipping legislation should reflect

⁹¹ Attorney-General's Department, advice 8 February 2000

⁹² Submission No. 28

community expectations that Australian workers should have broadly comparable OH&S standards across industry sectors, and recommended that the revised Act should remove any ambiguities in jurisdiction or replace the OHS(MI) Act.⁹³

9.18 The current highly prescriptive regulatory framework in the *Navigation Act 1912* operates differently from the duty of care regime adopted by the OH&S (MI) Act. AMSA has raised the difficulty involved in reconciling these two regulatory philosophies in its role as regulatory authority under the *Navigation Act 1912* and providing the inspectorate under the OH&S (MI) Act.

9.19 The OH&S (MI) Act establishes a series of general duties and provides a framework of workplace participation in standard setting and enforcement, complemented by codes of practice aimed at the prevention of workplace injury and disease. This contrasts with the reactive and adversarial role required of AMSA as the safety regulator under the *Navigation Act 1912*, which relies on inspection to determine non-compliance with pre-set standards, prosecution and compulsion by sanctions.

9.20 The proposed performance based approach for the *Navigation Act 1912* will provide a basis for better interaction with the *Occupational Health and Safety (Maritime Industry) Act 1993*. There is potential in the longer term to incorporate occupational health and safety duties and responsibilities into the overall safety management concept of the proposed regulatory framework for the *Navigation Act 1912*. This would obviate the need for separate occupational health and safety legislation for the maritime industry and encourage incorporation of these responsibilities within the ship safety systems culture, consistent with the requirements of the ISM Code.

9.21 Alternatively, with the transition to a company based employment regime, it is questionable whether there is a need for separate treatment of seafarers from other industry employees. One option could be for the OSH (MI) Act and associated workers compensation scheme to be absorbed into state based schemes, with seafarers treated in the same way as other employees, and residual aspects of safe operations could be dealt with under the proposed safety management systems approach of the revised *Navigation Act 1912*.

9.22 Industry views on the need to continue shipping specific OH&S and workers compensation legislation are divided, with some preferring integration with State based schemes and others wishing to continue the shipping industry scheme, in order to prevent forum shopping among different State schemes.⁹⁴ The Seafarers Safety, Rehabilitation and Compensation Authority indicated it welcomes debate on the impact of the proposed revisions on the statutory functions and operation of the Authority, and wished to be involved in consideration of any proposals impacting on the future administration of maritime industry occupational health and safety.⁹⁵ The Maritime Union of Australia indicated it was strongly opposed to any proposal to

⁹³ Submission No. 40

⁹⁴ Industry workshops, Melbourne 10 September 1999 and Sydney 22 September 1999; Shipping Reform Group (1997)

⁹⁵ Submission No. 72

incorporate the OH&S (MI) Act and associated workers compensation schemes into state based schemes, which would fragment an effective national system.⁹⁶

9.23 The Department of Employment, Workplace Relations and Small Business advised that it is working with the States to develop model legislation to address cross border forum shopping in State based workers compensation schemes, by prescribing the “home” State of an employee. Draft legislation is expected to be available for consideration in June 2000.⁹⁷ Until the legislation is introduced, it is likely that the shipping industry will prefer to retain an industry-specific workers compensation scheme.

9.24 The review agrees that until industry has the opportunity to assess the outcomes of this review and the implementation of the model legislation to prevent cross-border forum shopping, the current OH&S and Seacare schemes should remain in place. In the longer term, the need for continuation of separate maritime OH&S and worker’s compensation legislation should be discussed between the Department of Transport and Regional Services and the Department of Employment, Workplace Relations and Small Business, the industry and other stakeholders.

⁹⁶ Submission No. 74

⁹⁷ Communications, DEWRSB 15 May 2000

Recommendations

20. Shipping legislation should continue to support Australia's strong adherence to Flag State responsibilities and an active Port State Control program consistent with international obligations.

21. Australia should make full use of its authority under international law to regulate safety and marine environment protection in relation to vessels operating in or transiting the territorial sea and Exclusive Economic Zone which currently are not subject to Australia's Port State Control regime. The Department of Transport and Regional Services should explore further with the Attorney-General's Department whether there are any additional legislative avenues for extending shipping legislation to fill existing gaps in coverage of shipping operations in Australian waters.

22. Australia should seek international support to amend the provisions of UNCLOS and relevant international conventions that would enable a coastal state to take appropriate action to protect its marine environment by ensuring all shipping within its claimed jurisdiction complies with agreed international standards.

23. The Department of Transport and Regional Services should consult with the States and Northern Territory through the Australian Transport Council on the need to bring non-trading vessels over 500GT within the Commonwealth's jurisdiction for vessel safety regulation.

24. The Department of Transport and Regional Services should consult with the Department of Employment, Workplace Relations and Small Business and the industry about the longer term need to continue separate Occupational Health and Safety legislation for the maritime industry.

SAFETY AND ENVIRONMENT PROTECTION

10. SAFETY AND ENVIRONMENTAL PROTECTION REGULATION

10.1 The safety of a vessel, and consequent protection of the marine environment, depends on a range of factors covering the vessel itself and its operation. These can broadly be categorised into matters affecting (i) the vessel and its equipment, (ii) the crew, (iii) the cargo, and (iv) navigation.

10.2 Most nations have considered it necessary to regulate the standards of construction, maintenance, safe loading, crewing and operation of ships. The purpose of this regulation is to ensure the safety of ships, their cargoes and crews and protection of the marine environment from shipping-related pollution incidents.

10.3 Ships which do not comply with appropriate standards for vessel safety and crew competence pose a substantial risk to life, property and the environment. Pollution damage from shipping incidents can also adversely affect other marine based industries. The costs to industry of compliance with these regulations needs to be weighed against the potential costs to the community, the crews, shippers and the shipping industry in the event of a shipping incident. These latter costs, particularly if they involve significant pollution or loss of life, would far outweigh the costs of compliance.

International Conventions

10.4 Regulations provide for the application of the following International Maritime Organisation conventions concerning safety:

- International Convention for Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW)
- International Convention on Load Lines, 1966 Load Lines (LL)
- International Convention for the Safety of Life at Sea 1974 (SOLAS), including adoption of the ISM Code.
- Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS)
- International Convention for Safe Containers, 1972 (CSC)

10.5 A number of International Labour Organisation conventions ratified by Australia also contribute to safety at sea:

- 7. Minimum Age (Sea) 1920
- 15. Minimum Age (Trimmers and Stokers) 1921
- 16. Medical Examination of Young Persons (Sea) 1921
- 27. Marking of Weight (Packages Transported by Vessels) 1929
- 57. Hours of Work and Manning (Sea) 1936
- 58. Minimum Age (Sea) (Revised) 1936
- 73. Medical Examination (Seafarers) 1946
- 76. Wages, Hours of Work and Manning (Sea) 1946
- 92. Accommodation of Crews (Revised) 1949

- 93. Wages, Hours of Work and Manning (Sea) (Revised) 1949
- 109. Wages, Hours of Work and Manning (Sea)(Revised) 1958
- 133. Accommodation of Crews (Supplementary Provisions) 1970
- 137. Dock Work 1973

10.6 In many cases the provisions of these conventions are not explicitly given effect in the Act. They are often implemented through provisions that pre-existed the conventions but which were considered sufficient to demonstrate compliance with the conventions in national law. There is as a result some duplication of requirements and some lack of clarity. The legislation should apply relevant parts of conventions by direct reference to the conventions. The legislation should also make provision for regulations and Marine Orders to be made giving effect to amendments to conventions and associated resolutions of IMO.

Seaworthiness and Substandard Ships

10.7 A central tenet of safety regulation is that an owner and master have a duty to ensure that a ship does not put to sea unless it is seaworthy in every respect for the nature of the voyage it is embarking upon.

10.8 In the *Navigation Act 1912*, currently Division 3, Unseaworthy and Substandard Ships, requires in section 207(1) that all ships must be “seaworthy”. This is defined as meaning that the ship “is in a fit state as to condition of hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of the crew including officers and in every other respect to encounter the ordinary perils of the voyage then entered upon.” The ship also must not be overloaded.

10.9 Section 207(2) provides that a ship is deemed to be seaworthy if its condition and equipment correspond substantially to the particulars on the certificates issued under the SOLAS convention.

10.10 Section 207A also defines a “substandard” ship as a ship that is seaworthy but “conditions on board the ship are clearly hazardous to safety or health”. Vessels which seriously breach the provisions of Marine Orders Part 11, Substandard Ships, which implements the spirit of ILO 147 Merchant Shipping (Minimum Standards) Convention, may also be detained if considered to be substandard.

10.11 The requirement for all ships to be seaworthy should be emphasised as the basic test for the safety and pollution prevention requirements of the Act. The concept of “seaworthiness” should be broadened to encompass conditions on board the ship where these are hazardous to the safety and health of the crew or other persons aboard, in a similar manner to the matters currently covered by the Act’s definition of “substandard”. A “seaworthy” ship should comply with all relevant international conventions which are to be listed in the legislation.

Safety Management Systems

10.12 A targeted regulatory approach plays an important role in ensuring the safety of shipping. Systems that promote shared commitment, responsibility and

accountability for safety by all stakeholders can produce both better safety outcomes and greater flexibility and efficiency than prescriptive regulatory approaches. A modern safety regulatory system promotes accountability for safety underpinned by a culture and acceptance of responsibility for safe outcomes throughout the shipping operation.

10.13 Achievement of appropriate standards of safety in ship operations requires a safety consciousness in both shore based and ship based management and staff. Acceptance of responsibility for safety within an organisation leads to higher levels of safety performance than can be achieved by external prescription and inspection, as well as offering potential for the organisation to be more efficient by reducing lost time and costs of incidents.

10.14 In addition, the safety regulators require the authority to have appropriate auditing and enforcement systems in place to give effect to Australia's obligations under international conventions covering safe operational matters. The International Convention for the Safety of Life at Sea (SOLAS) 1974 is the primary international convention covering the safe operation of ships. In particular, Chapter IX of SOLAS implements the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code).

10.15 The ISM Code is aimed at promoting the development of a safety culture both ashore and at sea. It provides for the essential responsibilities and accountabilities of shore-based management, as well as providing for a crew to play an active and central role in the safety management of their ships. This includes ensuring that a vessel has a valid Safety Management Certificate issued by a competent body and a copy of the shipowner/operator's Document of Compliance. The Safety Management System should include all relevant documentation of safety and environmental policies, instructions and procedures, defined levels of authority and communications between ship and shore, reporting and emergency response procedures and audit and management reviews procedures. Relevant ship's personnel are required to be aware of their responsibilities and duties under the Safety Management System.

10.16 Under Regulation 2 of Chapter IX of SOLAS, the ISM Code came into effect for passenger ships, including high-speed passenger craft, and oil tankers, chemical tankers, gas carriers bulk carriers and cargo high-speed craft of 500 gross tonnage and over by 1 July 1998. Other cargo ships and mobile offshore drilling units of 500 gross tonnage and over are to comply with the ISM Code by 1 July 2002.

10.17 AMSA surveyors conduct port state control inspections against a ship's safety documentation, as well audits of the shipowner/operator's Safety Management System procedures. Where there are defects found in compliance with the requirements of the ISM Code, AMSA engages in an escalating program of inspections, which may result in ship detention and targeting of other ships owned by the same company for inspections.⁹⁸

10.18 The ISM Code is currently implemented by Marine Order 58 made under s191 of the *Navigation Act 1912*. MO Part 58 applies to Australian registered ships and foreign flag ships that are in Australia's territorial waters.

⁹⁸ AMSA Marine Notice 8/1997

10.19 The adoption of safety management systems is consistent with the performance based approach proposed by the review. Given the importance of the safety management systems approach as a principal means of achieving the objective for safety and environment protection, the primary legislation should explicitly apply the ISM Code requirements of SOLAS as Australian law. Shipping legislation should point to the duties of ship owners and operators to develop safety management systems consistent with the Code and provide for effective auditing of compliance and more flexible enforcement responses to cases of non-compliance.

Harmonisation with State and Territory safety regulation

10.20 The Uniform Shipping Laws (USL) Code was first developed in 1979 as a means of improving harmonisation of marine safety administration across State, Northern Territory and Commonwealth jurisdictions. It promulgates an agreed set of standards as the basis for uniform legislation across jurisdictions relating to the survey, manning and operation of commercial vessels in Australia. At the federal level, it is applied by AMSA to commercial vessels to which the international safety conventions do not apply. Generally these are vessels under 500 GT, to the extent that they currently come within the Commonwealth's jurisdiction.

10.21 Section 427 of the Act provides for the Minister to make declarations, published by order in the Gazette, that the provisions in the order are the provisions of the Uniform Shipping Laws (USL) Code or variations to that Code, as determined by the Australian Transport Advisory Council (ATAC) from time to time. The purpose of this provision is to provide a formal means of identifying the currently agreed standards for reference by Commonwealth and State/Territory legislation.

10.22 The ATAC is the former title of the Council of Commonwealth, State and Northern Territory Ministers responsible for transport matters, including ports and marine affairs. It has been known as the Australian Transport Council (ATC) since 1993.

10.23 The provisions of the Code do not have the force of law except to the extent that they are adopted in Commonwealth, State or Territory legislation. In practice, the Code and its subsequent amendments have been adopted over time in various ways by the different jurisdictions, to the extent that significant variations now exist in the legal requirements across the various jurisdictions. The USL Code also has been criticised as being highly prescriptive and lacking the flexibility and responsiveness necessary to meet the needs of modern shipping regulation.⁹⁹

10.24 The National Marine Safety Committee¹⁰⁰ has been developing an alternative approach to harmonised marine regulation, which is expected to replace the USL Code in due course. The Committee proposes to publish a National Standard for Commercial Vessels (NSCV). The NSCV will reflect modern safety management

⁹⁹ Thompson Clarke Shipping Pty Ltd (1995) Review of Maritime Safety Arrangements in Australia

¹⁰⁰ The NMSC was established by ATC under an Intergovernmental Agreement signed by the Prime Minister, Premiers and the Chief Minister of the Northern Territory in 1997. A high priority of the agreement was the revision of the USL Code to ensure technical standards remain relevant in the light of changes in technology and safety regulation and management practices. Since 4 April 2000 the NMSC and the Marine and Ports Group of ATC were consolidated into a single sea transport group called the Australian Maritime Group

principles, providing for innovation in design and promoting consistency across jurisdictions. Development of the NSCV is expected to be substantially completed by early 2002, when it will be submitted to the Australian Transport Council.

10.25 The proposed performance based approach of the NSCV is consistent with the model for safety regulation proposed for revision of the *Navigation Act 1912*. It is also consistent with the direction of modern safety regulatory thinking and the 1997 Intergovernmental Agreement for facilitating harmonised application of safety standards across Commonwealth and State/Territory jurisdictions.¹⁰¹

10.26 The National Marine Safety Committee submitted that the revised legislation should continue to provide for the Minister to gazette revisions to the USL Code and/or any other standard, code, or guidance material as determined by the ATC.¹⁰²

10.27 Commonwealth shipping legislation should continue to provide for safety regulation of non-convention size vessels within Commonwealth jurisdiction. The legislation should also continue to provide for the Commonwealth to gazette any necessary standards or guidelines for vessel safety as agreed by Commonwealth, State and Territory Ministers, to readily identify harmonised standards consistent across all national, State and Territory jurisdictions.

¹⁰¹ Council of Australian Governments (1997) Intergovernmental Agreement for a National Marine Safety Regulatory Regime

¹⁰² Submission No. 63

Recommendations

25. The legislation should apply relevant parts of international maritime safety conventions by direct reference to the conventions, and make provision for regulations to give effect to conventions, amendments and resolutions associated with the conventions.
26. The legislation should continue to prohibit the taking to sea of an unseaworthy ship, and require all owners, operators and masters to ensure that a ship is seaworthy in all respects for its intended voyage.
27. The concept of “seaworthiness” should include the conditions on board which affect the safety and health of the crew.
28. A seaworthy ship should comply with all relevant international conventions as listed in the Act.
29. The legislation should explicitly apply the ISM Code requirements of SOLAS as Australian law and point to the duties of ship owners and operators to develop safety management systems consistent with the Code.
30. Shipping legislation should continue to provide for consistency and harmonisation of standards with the States and Territories for both convention and non-convention sized vessels under the Uniform Shipping Laws Code or the proposed National Standard for Commercial Vessels.
31. Commonwealth shipping legislation should continue to provide for the Minister to gazette revisions to the Uniform Shipping Laws Code and/or any other standard, code, or guidance material as determined by the Australian Transport Council.

11. CREWS AND QUALIFICATIONS

11.1 A ship's crew is recognised as being an integral part of the safe operation of a ship. Standards for training, qualifications and certification are considered an essential means of minimising risk to both the crew (occupational health and safety) and to the safety of the whole vessel and its cargo. Different competency standards are required for deck and engineering officers and crews. International conventions state that no master or officer shall be engaged to perform duties at sea unless they hold proper certificates. They also specify the basic requirements for granting certificates including minimum age, health and fitness, basic experience and required examinations. They also provide for port state inspection to include crew competency and minimum manning requirements and proscribe penalties for breaches of the conventions.

11.2 Attention at the international level has focused on improving observance of international standards relating to crew qualifications and crewing levels, safe shipboard operations, and ensuring that working and living conditions on board ship do not threaten the safety and health of the crew. There is also a greater focus on the human dimensions of accidents, particularly the effects of fatigue and other "fitness for duty" factors.

Standards of Training, Certification and Watchkeeping

11.3 The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978, as revised by the 1995 Convention, is aimed at promoting safety of life and property at sea and the protection of the marine environment through the establishment of commonly agreed international standards of training, certification and watchkeeping for seafarers.

11.4 Parties to the 1978 Convention are required to certify that its seafarers meet the Convention's requirements for service at sea, including minimum age, medical fitness, training, qualifications and examinations. The 1995 amendments, revise the original convention and adopt measures aimed at the application of uniform standards by ratifying States, which are required to lodge with the IMO detailed advice of the national training and certification measures adopted to comply with its requirements. STCW 1995 also adopted the STCW Code which provides for technical regulations for its implementation, including enhanced procedures for exercise of port State control allowing intervention where deficiencies are deemed to endanger life, property or the environment.

11.5 The *Navigation Act 1912* does not expressly give effect to the STCW Convention. However, Division 3 of Part II covers qualifications of masters, officers and seamen. It provides in section 15 for the making of regulations which "may include conditions as to age, character, health, nationality, citizenship or residence". Section 16 prohibits persons falsely representing themselves as qualified seafarers and persons employing another person as a seafarer if the latter is not qualified.

11.6 Section 17 requires production of seafaring qualifications when demanded by a "proper authority". The latter is defined as a superintendent appointed under the *Navigation Act 1912* or a person with similar powers and duties as a superintendent

under the law of another country of a diplomatic representative of Australia or another country.

11.7 Marine Orders Part 3, Seagoing Qualifications, expressly implements the STCW 1995. It specifies the standards of competence to be attained and other conditions to be satisfied by a person in order to qualify as a master, officer or seaman in accordance with the Convention.

11.8 The Marine Order also reflects elements specific to the Australian shipping industry originating in the crewing reforms of the late 1980s.¹⁰³ Consistent with overseas' practice, the reforms involved multiskilling, broadbanding of jobs, greater team work, improved career opportunities and breaking down social barriers between crew members. The adoption of these concepts was viewed as fundamental to improving the efficiency of the industry and contributed to the reduction in the average crew size on Australian flag ships from 28 in the mid 1980s to 18 by the early 1990s¹⁰⁴. This built upon the reform program initiated by the 1982 Report, *Revitalisation of Australian Shipping*, by the late Sir John Crawford, that saw crew sizes on new ships lowered from 33 to 26 on bulkcarriers and 37 to 29 on coastal tankers.

11.9 Marine Orders Part 3 includes requirements for the training of the category of 'integrated rating' who is capable of working both on deck and in the engine room and therefore requires competencies in both areas of ship operation. While the integrated rating concept is within the discretion afforded to maritime administrations in the implementation of the STCW Convention, it is not a category specifically recognised by the STCW regime. The Marine Order also spells out in some detail the career paths for deck and engineer officers.

11.10 The introduction of these crewing reforms was regarded by the industry at the time as "the most radical change in ship manning arrangements in Australia's maritime history".¹⁰⁵ Shipping industry and maritime union representatives support the retention of these elements in the regulation of crew qualifications. There was general support for a greater degree of prescription in this area to underpin the continuation of these crewing initiatives¹⁰⁶, albeit with different views as to how this might be achieved. Crew qualifications are seen as an important means of achieving safety outcomes. Concern was expressed by a number of submissions that safety aspects of the regulation are confused with industrial matters by the current placement of the crew qualification provisions in Part II of the Act, and there was support for regrouping these provisions with other safety matters.¹⁰⁷

11.11 Submissions from the offshore petroleum industry suggested that removal of prescriptive qualification requirements would provide a significant efficiency gain for the industry by allowing for more flexibility in the use of staff on-board offshore facilities. Use of a safety case approach would allow an operator to demonstrate that

¹⁰³ Maritime Industry Development Committee Report, *Moving Ahead*, AGPS, Canberra, October 1986, page 9

¹⁰⁴ Bureau of Industry Economics Research Report 68, *International Performance Indicators: Coastal Shipping 1995*, AGPS, Canberra, July 1995, page 11

¹⁰⁵ Australian National Maritime Association, *Australian Shipping Structure, History and Future*, ANMA, Melbourne, 1989, page 117

¹⁰⁶ Industry workshops, Melbourne 10 September 1999, Sydney 22 September 1999 and Submission No 48

¹⁰⁷ Industry workshops, Melbourne 10 September 1999, Sydney 22 September 1999 and Submission No 38

all persons responsible for safe shipping operations are fully competent.¹⁰⁸ This issue is discussed further in Chapter 18.

11.12 The Australian Maritime College indicated its ability to compete in the international training market is restricted by a prescriptive approach to training and qualification requirements in Marine Orders. The College is concerned that only minimal amounts of prior learning overseas is recognised by AMSA and that training in partnership with an overseas education provider can only be done with a minimal amount of the course being conducted overseas. It argues that a less prescriptive, interventionist and restrictive approach would facilitate export of its education services.¹⁰⁹

11.13 Under the 1995 amendments to the STCW Convention, Parties to the Convention are required to provide detailed information to the IMO concerning administrative measures taken to ensure compliance with the Convention. This information is used by the Maritime Safety Committee (MSC), IMO's senior technical body, to identify Parties that are able to demonstrate that they can give full and complete effect to the Convention. Other Parties will then be able to accept that certificates issued by these Parties are in compliance with the Convention. This regulation is regarded internationally as particularly important, because it means that Governments have to establish that they have the administrative, training and certification resources necessary to implement the Convention. No such proof was required in the original Convention, leading to complaints that standards differed widely from country to country and certificates could therefore not always be relied on.

11.14 AMSA maintains that it is unable to guarantee the course content and quality of training conducted in overseas institutions or the quality of prior learning acquired overseas. Consequently, it is concerned that it would not be in a position to demonstrate compliance with the convention if it approved training leading to the issuing of Australian certificates of competency where there is a significant reliance on overseas training institutions and experience. The validity of any Australian certificates of competency issued under such circumstances would be open to question.

11.15 AMSA also argues that issuing such certificates is likely to undermine international confidence in all Australian maritime certificates, which presently have a high standing internationally. This would disadvantage Australian seafarers wishing to work overseas and would be a constraint on the competitiveness of businesses wishing to employ seafarers holding Australian certificates, as their ships may be held up under foreign Port State Control inspections.

11.16 The review agrees that Australia has an obligation to ensure that its procedures for issuing certificates of competency and approving training of seafarers are consistent with STCW requirements, and that AMSA should not approve measures that undermine the integrity of our current systems. Nevertheless, other progressive professions in Australia have processes for assessing and recognising suitable overseas learning and qualifications. It would be consistent with the concept of

¹⁰⁸ Submission No 36, and industry workshop Perth 20 September 1999 and Perth 14 April 2000

¹⁰⁹ Submission No 30

performance based regulation that AMSA and the AMC explore mechanisms adopted by other industries as part of AMSA's review of the details of Marine Orders. This may offer a way forward that reduces any disadvantage to the AMC from the current system of certification, while not undermining its integrity and the benefits to all holders of Australian certificates and their employers. The present requirements for achieving Australian certification does not prevent the College from competing in the international market to provide STCW compliant training leading to the issue of maritime certificates by the respective overseas authorities.

11.17 The Department of Agriculture, Fisheries and Forestry, Australia supported in principle that Australia should ratify the related STCW-F Convention, noting that the IMO Flag State Implementation Sub-Committee at its Eighth Session in January 2000 called for States to ratify it along with the Torremolinos Convention.¹¹⁰

11.18 STCW-F, the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F), 1995 is the first attempt to make standards of safety for crews of fishing vessels mandatory. The Convention will apply to crews of seagoing fishing vessels generally of 24 metres in length and above. To date only 2 nations have accepted the convention and it has not yet entered into force internationally.

11.19 It was originally intended that requirements for crews on fishing vessels should be developed as a Protocol to the main STCW Convention, but after careful consideration, IMO members agreed that it would be better to adopt a completely separate Convention. Previously efforts to improve the training, certification and watchkeeping standards of fishing vessels' personnel have been adopted as recommendations in Assembly resolutions and the Document for Guidance on Fishermen's Training and Certification produced jointly by IMO and the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO).

11.20 Adoption of STCW-F would be consistent with the proposal to adopt the Torremolinos Convention dealing with fishing vessel standards (see Chapter 14), reflecting that some fishing vessels on international voyages come within the Commonwealth's jurisdiction. It would be appropriate for the legislation to reflect agreed international standards designed to address the specific circumstances of fishing vessel operations.

11.21 The replacement to the *Navigation Act 1912* should refer specifically to STCW 1995 in the part of the Act calling up a consolidated list of international conventions being implemented by the Act. The regulation making power also should reflect the requirements to fully implement the Convention. The proposed statement of duties requires shipowners, operators and masters to engage only appropriately qualified crew and seafarers to maintain the required certificates of competency and not to misrepresent their level of qualifications. Shipping legislation should also refer to the STCW-F convention if and when Australia has accepted the convention.

¹¹⁰ Submission No. 51

Minimum Age

11.22 Some kinds of work at sea may fall into the category of “work likely to jeopardise the health, safety or morals” for which a minimum age of 18 years is normally considered appropriate, although in some circumstances lower ages may be acceptable. ILO Convention No 7 Minimum Age (Sea) 1920 requires children under 14 years not to be employed or to work on any ship engaged in maritime navigation. ILO Convention No. 58, Minimum Age (Sea) (Revised) 1936 requires persons employed on ships to be 15 years and over.

11.23 These requirements are implemented in Australia through section 48A of the *Navigation Act 1912*, which provides that a person shall not engage another for service at sea unless the latter is of the minimum age specified by regulations.

11.24 Marine Orders Part 53, Employment of Crews, provides that for the purposes of section 48A, the minimum prescribed age is 16 years. This age is consistent with Australian community standards for minimum compulsory schooling and a general expectation that children would not engage in full time work before this age. However, MO53 notes that the performance of many duties aboard ship requires a person to be older and refers to Marine Orders Part 3, Seagoing Qualifications. This requires ratings to be 18 years or more to be eligible for issue of certificate of proficiency and officers to be 20 years or more to be eligible for second mate’s certificate or engineer watchkeeper’s certificate. Higher minimum ages for these certificates reflect the requirement for experience at sea appropriate to the duties of the position.

11.25 The legislation should retain a minimum age for service at sea. Continued specification of the minimum age higher than that specified by ILO conventions is warranted in light of Australian community standards for the school leaving age.

Fitness for Duty at Sea

11.26 Fitness for duty at sea encompasses a range of matters that may be independent of qualifications, experience or skills. These include factors such as medical health and fitness, fatigue, appropriate provisioning of ships and the use of drugs and alcohol.

11.27 The health and fitness of seafarers is an important element in shipboard safety. A ship is a relatively remote workplace that may operate in unfavourable conditions and be isolated from access to medical care. Assessments of seafarers medical fitness needs to have regard to the physical demands of seagoing work and the isolated nature of the workplace to ensure that there is no undue risk to themselves, the rest of the crew or emergency services personnel.

11.28 Medical Fitness: ILO Convention No. 73, Medical Examination (Seafarers) Convention, 1946 requires every seafarer engaged on a ship to possess a certificate attesting to their fitness for the work for which they are employed, signed by a medical practitioner. The certificate is to be valid for two years but a certificate attesting to colour vision remains valid for six years.

11.29 The STCW Convention 1995 also requires establishment of medical fitness standards for seafarers and certificates of competency to be issued only to persons complying with those standards and by having a valid medical certificate issued by a recognised medical practitioner. Seafarers are required to revalidate certificates of competency every five years which includes having to meet the medical fitness standards.

11.30 Section 134 of the *Navigation Act 1912* allows regulations to be made specifically to give effect to ILO Convention No. 73. Section 124 allows regulations to be made for the issue of certificates of fitness to seafarers and to prohibit engagement of persons as a seafarer unless such a certificate is held. Marine Orders Part 9, Health – Medical Fitness, gives effect to the medical fitness provisions in both ILO Convention No. 73 and the STCW Convention 1995. It provides detailed medical standards for seafarers and coastal pilots, guidelines for conduct of their medical examinations, including job task analyses for the different crew classifications, and requirements for the issue of certificates of medical fitness.

11.31 Section 123 of the *Navigation Act 1912* allows AMSA to appoint designated medical practitioners as Medical Inspectors of Seamen and Marine Orders Part 9 requires a person to apply to a Medical Inspector of Seamen for a certificate of medical fitness. Marine Orders Part 9 advises that AMSA gives preference in appointment of qualified medical practitioners who are Fellows of the Australasian Faculty of Occupational Medicine. This has allowed the appointment of experienced medical practitioners who become familiar with the demands of seagoing work and the required medical fitness standards.

11.32 The legislation should continue to recognise implementation of ILO Convention No. 73 and duties imposed on shipowners/operators, masters and crew to meet medical fitness requirements. The provision for appointment of Medical Inspectors of Seamen, however, should be repealed and seafarers should be free to consult the medical practitioner of their choice to obtain a certificate of medical fitness as prescribed in Marine Orders Part 9. Detailed guidelines for medical examinations of seafarers already are provided in Marine Orders Part 9 and these, along with other audit mechanisms, could be used to ensure consistency in application of medical fitness standards. Employers would have the responsibility for ensuring that medical certificates are valid and for developing procedures in employment agreements for handling any disputes over the validity of certificates and individual seafarers' medical fitness for the particular task. The legislation should provide appropriate sanctions against employers engaging medically unfit persons. AMSA should have the power to suspend certificates of individuals found to be medically unfit.

11.33 Medical Care at Sea: In relation to the ongoing medical care of seafarers at sea, the *Navigation Act 1912* requires, in section 125, for the master, owner and agent to ensure that a ship carries prescribed medicines and medical equipment. Section 126 allows AMSA to inspect the medicines and require the master to rectify any deficiency. ILO Convention No. 164, Health Protection and Medical Care (Seafarers) 1987, requires measures to be adopted to provide health protection and medical care of seafarers comparable to workers ashore including carriage of appropriate medical stores. Industry representatives noted that in some circumstances the prescriptive

application of Marine Order Part 10, Medicines and Medical Stores, imposes an unnecessary cost on particular ships' operations.¹¹¹

11.34 Although Australia has not ratified ILO Convention 164, its intention is reflected in the provisions of the Act. The review proposes their retention in the revised Act by imposing a duty on shipowners/operators and masters to ensure a supply of medicines and medical equipment is maintained appropriate to the demands of the ship's trade. Guidance on suitable medicines to be carried should be provided in Marine Orders, but operators should have greater flexibility to determine requirements suited for their specific operations.

11.35 Appropriate Provisioning of Ships: The health and wellbeing of ships' crew is also dependent on the quality and quantity of provisions and water to sustain them during each voyage. ILO Convention No. 68, Food and Catering (Ships' Crews) 1946, prescribes minimum standards concerning food supply and catering services. It requires laws or regulations on food supply and catering services designed to secure the health and wellbeing of ships' crews, food and water supplies to be provided in accordance with crew size and duration and nature of voyage and suitable quantity, nutritive value, quality and variety. It also requires arrangement and equipment of the catering department in every ship to be such as to permit service of proper meals to the members of the crew.

11.36 Although Australia has not ratified ILO convention No. 68, there are several provisions in the *Navigation Act 1912* dealing with the supply of food and water on Australian registered ships which are in line with the spirit of the Convention. Section 117 requires the master to ensure the carriage of a suitable quantity and quality of provisions and water before undertaking a voyage and section 117A requires the shipowner to provide proper catering facilities on board ship. Section 116 allows three or more crew members to complain to an AMSA appointed superintendent about the quantity or quality of food and water provided and AMSA can require the master to provide good quality provisions. Section 120 allows AMSA to inspect a ship at an Australian port and detain it if provisions are found to be of deficient quality and section 122 provides that AMSA may direct the disposal of deficient provisions. In the case of a dispute with the crew over the quantity of provisions, section 119 requires the master to have them weighed and measured in the presence of a witness to ensure the use of correct weights and measures.

11.37 The legislation should retain provisions requiring an employer to provide appropriate provisions and water and catering arrangements, but this should be in the form of specifying the duty of a shipowner/operator and master to ensure adequate supplies and facilities. Specification of the details of provisioning and means of resolving disputes should be repealed and covered by company based procedural manuals.

11.38 Abuse of Alcohol and Other Drugs: Fitness for seagoing service includes the requirement for crew to be capable of performing their duties at any time while aboard ship and not being impaired by alcohol or other drugs. This requirement recognises that the performance of a crew member who is impaired by alcohol or drugs adds to the level of risk to his safety, the other crew and the ship. This applies

¹¹¹ Industry workshop, Perth 20 September 1999

even when a crew member is off duty as an emergency situation may arise at any time on a ship to which all crew members must respond.

11.39 The *Navigation Act 1912* was amended in 1991 to include a specific provision in section 386A prohibiting the abuse of alcohol and other drugs (medicinal or otherwise) to such an extent that the person's capacity to carry out duties was impaired. A penalty of 12 months imprisonment was imposed for contravention of the provision and two years' imprisonment if the impairment caused or contributed to loss, destruction or damage to the ship or another ship or the death or injury of another person.

11.40 In 1995, the *Navigation Act 1912* was amended by adding section 386B specifying objective limits for blood alcohol levels for seafarers on all vessels within Australian territorial seas and all Australian vessels worldwide. The limit of blood alcohol content, specified in s386B, in the case of a master or seaman while on duty is 0.04 grams of alcohol per 100 millilitres of blood. In the case of a master or seaman on board a ship but not on duty, the limit is 0.08 grams of alcohol per 100 millilitres of blood.

11.41 Section 386C allows for physical examination by a medical practitioner and/or the taking of breath, urine or blood samples if a person authorised by AMSA has reasonable cause to believe that the capacity of a crew member to undertake duties is impaired because of alcohol or other drugs. It also is an offence under sections 386D and 386E for a master or a seaman to refuse to provide a sample of breath for analysis or refuse to undergo a medical examination and to submit to tests.

11.42 Legislation in some States specifies more limited blood alcohol levels for seafarers than the *Navigation Act 1912* and therefore ship's personnel may be subject to such State legislation when in port or at anchor within State waters.

11.43 The Australian Federal Police recommended that the review should examine the blood alcohol levels in more modern road transport and marine legislation, such as that enacted by New South Wales.¹¹²

11.44 The New South Wales *Marine (Boating Safety Alcohol and Drugs) Act 1991* provides that it is an offence for a person to operate a vessel on any waters while under the influence of alcohol or any other drug. It also is an offence if the master of a vessel permits another person to operate the vessel if he is aware that the person is under the influence of alcohol or any other drug.

11.45 The New South Wales *Road Transport (Safety and Traffic Management) Act 1999* prescribes a graduated penalty system depending on whether an offender's blood alcohol level is low, medium or high. The low range applies from 0.05 to less than 0.08 grammes, the middle range from 0.08 to less than 0.15 grammes and the high range from 0.15 or more grammes, per 100 millilitres of blood.

11.46 TT Line also supported lower limits for alcohol consumption, indicating that company policy establishes limits below those permitted under the *Navigation Act 1912*. TT Line supported an eventual move towards zero alcohol as the national

¹¹² Submission No. 24

standard for a seagoing ship, on the grounds that a crew member may be required to respond instantly to an emergency at sea, even if not rostered on duty.¹¹³

11.47 The current provisions in the *Navigation Act 1912* prohibiting the abuse of alcohol and other drugs, but allowing a social level of alcohol consumption, should be retained in the Act and regrouped with other provisions relating to the crew safety section of the legislation.

11.48 The review notes that the current technical specifications for the level of permitted blood alcohol content prescribed in the Act were determined some time ago. It is appropriate that these should be subject to early review by AMSA in consultation with the industry, in line with research on safety requirements for such specifications in other areas of safety regulation. Companies would still have flexibility to determine their own management policies for acceptable alcohol limits, consistent with the proposed duty of care to provide a safe workplace and to operate a ship safely.

11.49 One submission called for mandatory breath testing of all watchkeepers before handing over of the watch and random drug testing of ships' crews.¹¹⁴ Industry views on this suggestion were divided, with some favouring a power for the master to test crew, while others thought this is a matter for internal company management.¹¹⁵

11.50 The Act already provides for testing where AMSA has reasonable cause to believe a person's capacity is impaired by drugs or alcohol. Mandatory testing would involve unnecessary, additional costs and constraints on ship operations. Adoption in legislation of a performance based safety management systems approach would also support leaving alcohol and drug policy as a company based responsibility. Some companies voluntarily have implemented company-based mandatory "no alcohol" and random testing policies. The review considers that it would be appropriate for any mandatory testing to remain a matter of company policy for safe operations, consistent with their obligations and duties of care.

Minimum Manning and Fatigue Management

11.51 Technological developments in shipping have supported a decline in the number of each category of crew required to safely operate a vessel, while also increasing the complexity of their tasks.

11.52 Regulation of minimum safe manning levels aims to ensure that for a given class of vessels, sufficient numbers in each category of crew are available to carry out minimum requirements for safe operation and navigation of the vessel. This is different from the manning requirements for the efficient commercial operation of a ship, which is a matter for the individual company to determine.

11.53 SOLAS 1974 (Regulation 13 of Chapter V) requires provision of ships with "... an appropriate safe manning document ... as evidence of the minimum safe manning considered necessary." STCW 1995 allows in Article X for port States to

¹¹³ Submission No. 71

¹¹⁴ Submission No. 12

¹¹⁵ Industry Workshop Sydney 6 April 2000

verify that the numbers of seafarers serving on board a ship are in conformity with the applicable safe manning requirements of the Flag State Administration.

11.54 Section 14 of Division 2A of the *Navigation Act 1912* provides AMSA with power to make Marine Orders requiring a ship, or class of ships, to carry a qualified master and specified numbers of qualified officers and seamen. Since 1991, subsection 14(3) has required AMSA to only exercise these powers “to the extent that it appears necessary or expedient in the interests of safety or the protection of the marine environment”. Marine Orders Part 29 allows AMSA to issue an appropriate safe manning document as evidence of the minimum safe manning considered necessary to comply with Regulation 13 of SOLAS.

11.55 The minimum safe manning provisions should be retained in shipping legislation and grouped in the ship safety section of the legislation.

11.56 Fatigue has been identified as a contributing factor to accident risk in the maritime industry. Attention has been directed at the national and international level to developing strategies and guidelines to reduce the potential for fatigue and the risk of accident.

11.57 Several factors specific to the shipping industry impose additional demands on crews that may heighten their fatigue level. These include the environmental hardships at sea, weather conditions, broken rest periods, long working hours, separation from home and the need to accommodate other crew members’ varying backgrounds to ensure harmonious working and living conditions aboard ship for extended periods.

11.58 STCW 1995 prescribes basic principles for maintenance of navigational and engineering watchkeeping standards. The convention also provides that sufficiently qualified crew must be assigned to each watch who can operate essential equipment for safe navigation, radio communications and prevention of marine pollution. For the purposes of preventing fatigue, the convention requires minimum rest periods to be enforced for watchkeeping personnel so they are sufficiently rested and fit for duty. Marine Orders Part 28, Operations Standards and Procedures, which implements the watchkeeping provisions of STCW 1995, was made pursuant to section 425(1AA), the general power for AMSA to make Marine Orders to regulate, inter alia, the safe navigation and operation of ships.

11.59 As previously noted, the *Navigation Act 1912* does not explicitly give effect to STCW 1995 and this should be rectified.

Discipline

11.60 The *Navigation Act 1912* originally gave considerable emphasis to the maintenance of discipline on board ship and treated breaches of discipline by the crew as offences against the Act incurring fines and/or imprisonment.

11.61 In 1986, the provision providing for offences in relation to disciplinary matters was repealed by the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1986*. This removed from the Act such offences as desertion, failure to join the ship without cause, insubordination or wilful disobedience of a lawful command, assault of the

master or other officer, conspiring with another crew member to disobey a command or to neglect duty or to impede navigation of the ship, and wilful damage to the ship, or its equipment or stores.

11.62 In its place, the shipping industry developed the Code of Conduct for the Australian Merchant Navy which set out standards of behaviour and conduct for seafarers engaged on Australian registered ships.

11.63 In the *Navigation Act 1912*, Division 12, Discipline, encompasses three matters relating to discipline: acts tending to endanger the ship or life, stowaways and smuggling by the crew. The latter two matters are dealt with in Chapter 21.

11.64 Section 99 imposes a penalty of a fine of up to \$5,000 and/or up to two year's imprisonment for acts tending to endanger the ship or life. This concerns a master's or a seaman's wilful breach or neglect of duty or by reason of drunkenness resulting in an act or failure to do an act tending to the immediate loss, destruction or serious damage to the ship or the cargo or endangering persons on board the ship. Penalty provisions are a necessary incentive to prevent persons aboard a ship from engaging in wilful acts that may tend to jeopardise safety or pollution prevention.

11.65 The special requirements of the shipping industry justify the master having authority over all people on board of ship. This approach is recognised in the ISM Code, which requires the ship operator to clearly define and document the master's responsibility in relation to implementation of the safety and environmental protection policy. A ship's Safety Management System should establish that the master has overriding authority and responsibility to make decisions with respect to safety and pollution prevention.

11.66 This approach could be reflected in general statement of duties for the master as including the duty to ensure the safety of the ship and having overriding authority over persons on board to ensure safety of ship, life at sea and pollution prevention. There should be a corresponding duty upon the crew and other persons on board ship to comply with the master's authority. The penalty provision should complement the general duty statement and be extended beyond the crew to anybody on board a ship whose actions endanger the ship, the environment or life at sea.

Recommendations

32. The legislation should continue to provide for application of relevant international conventions concerning the qualifications of seafarers, minimum age for work at sea, medical fitness, medical care, provisions and minimum manning and fatigue management for safety and marine environment protection. These conventions would include:

- (a) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1995,
- (b) International Convention on Standards for Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F)
- (c) ILO Convention No. 58 Minimum Age (Sea) (Revised), 1936,
- (d) ILO Convention No. 73 Medical Examination (Seafarers), 1946, and
- (e) International Convention for the Safety of Life at Sea (SOLAS) 1974 in relation to medical fitness and minimum manning requirements for safety and marine environment protection.

33. The legislation should continue to include the power to make regulations and Marine Orders in respect of all aspects of the qualifications of seafarers and conditions to be satisfied for employment at sea including minimum age, medical fitness, and consumption of alcohol and drugs. A minimum age of 16 is warranted in light of Australian community expectations for children in full time work.

34. The current limits on alcohol consumption in the *Navigation Act 1912* should be subject to early review by AMSA in consultation with the industry and regularly reviewed in future to ensure that they are consistent with trends in other jurisdictions and industries.

35. The Discipline provisions in Division 12 of Part II of the *Navigation Act 1912* should be repealed. The provisions in this Division dealing with acts by the ship's crew tending to endanger the ship or life should be revised to reflect the ISM Code requirement that the master should have overriding authority over all persons on board a ship with respect to safety and pollution prevention. Provision should also be made for penalties against persons engaging in acts that endanger the ship, life or the environment.

12. SHIP OPERATIONS

Safe Navigation

12.1 It is a generally accepted principle in international law and practice that the ship's master has responsibility for the safe navigation of a ship at all times, including when it is operating under pilotage or a vessel traffic management system. This concept is not explicitly stated in the *Navigation Act 1912*, although s410B notes that a master is not relieved from responsibility for the conduct and navigation of the ship by reason only of the ship being under pilotage. The revised Act should explicitly define the master's responsibility for safe navigation under the proposed part concerning duties.

12.2 Uniform, internationally accepted requirements for safe and orderly navigation at sea are necessary to prevent collisions and related incidents, such as groundings, that may cause loss of life, damage to property or pollution of the environment. Collisions and groundings represent the most common source of maritime incidents, despite the adoption of modern navigation aids such as radar, sonar, electronic charting display and information systems and GPS. The costs of repairs to vessels and remediation of any resulting environmental pollution has risen dramatically in recent years. Even relatively minor collisions may result in heavy costs.

12.3 Legislation seeks to encourage the use of consistent "rules of the road" to prevent accidents. These rules encompass such matters as keeping an adequate lookout, procedure for right of way, procedures for use of radar and radio equipment, standards for signalling and navigation equipment, warning lights and sound signals and a duty to comply with traffic instructions and traffic separation schemes. Particular rules for ships carrying hazardous or noxious cargoes or representing other special risks to the environment are also incorporated. Given the fundamental importance of navigational safety, the legislation should continue to cover all ships sailing in national waters and all vessels flying the national flag.

12.4 The internationally agreed rules in this regard are those in the Convention on the International Regulations for Preventing of Collisions at Sea 1972 (COLREGS) which applies to all vessels upon the high seas and connected navigable waters.

12.5 Under COLREGS, all vessels are required at all times to maintain a proper lookout, including by use of radar where appropriate, and to proceed at a safe speed in accordance with their circumstances to allow them to take action to avoid any collision. The rules include detailed requirements for steering and sailing when ships are in conditions of visibility, within sight of other ships, and restricted visibility. It prescribes use of various coloured lights and shapes of lights to be displayed, and the use of sound and light signals, including those to be used by ships in distress.

12.6 The Convention is given effect in Australia by the *Navigation Act 1912*, Division 11 of Part IV, the Navigation (Collision) Regulations 1982 and Marine Orders Part 30, Prevention of Collisions. The Navigation (Collision) Regulations only provide that the measures to be observed for the prevention of collisions between ships are those in Marine Orders Part 30, Prevention of Collisions. The regulations require a master, mate or other person concerned with the navigation, management or working of a ship to comply with the measures in Marine Orders Part 30.

12.7 The States and Northern Territory also have legislated to give effect to the COLREGS either by legislation to effect the Convention itself or by adoption of section 16 of the Uniform Shipping Laws Code which includes the COLREGS. Sections 258(2A) to (2E) of the *Navigation Act 1912* describe the manner in which the Commonwealth and State/Territory laws interact to cover all types of vessels when at sea, whether in Commonwealth, State or Territory waters, or operating in inland waterways.

12.8 Section 258(2F) provides penalties for breach of the regulations of a fine of up to \$10,000 and/or two year's imprisonment. A person must not be prosecuted under both Commonwealth and State/Territory laws for the same offence. The Act requires in section 258(5) for a Court hearing such proceedings to have the assistance of not less than two assessors of nautical experience to advise the Court. These assessors were appointed under the now repealed provisions of Part IX of the Act. This requirement is considered to impose an unnecessary expense and inconvenience on all parties involved in a case and should be repealed. Parties would still have the discretion of appointing assessors if they decide it would be necessary to assist proceedings.

12.9 Section 258A, concerning the need for careful navigation near ice, reflects requirements of the SOLAS Convention. A master is liable for a fine of \$10,000 and/or four year's imprisonment for contravention. A specific provision for careful navigation near ice does not appear warranted in light of the general specification for a ship to be navigated safely in all circumstances. Section 258A should be repealed.

12.10 Section 258AA provides for the Minister to certify amendments to the COLREGS. This provision allows for timely updating into national law of any amendments to the international arrangements and should be retained.

Charts

12.11 A master or an owner of an Australian ship is also required by s410A not to permit a ship to go to sea unless it has charts suitable for its intended voyage and to ensure every navigation officer has access to the charts during the voyage. These matters are important to the safe navigation of a ship and should be grouped with other matters related to safety of navigation. The provisions also should be cast in a manner that recognises the adoption of modern electronic charting and display systems. Revisions to SOLAS due to enter into force on 1 July 2002 provide, for the first time, specific guidance regarding the provision of hydrographic services, related definitions and the use of electronic charting technologies.¹¹⁶ The revised *Navigation Act 1912* should reflect relevant aspects of the revisions to SOLAS.

Navigational Equipment

12.12 Chapter V of SOLAS contains provisions for equipment on board ships. Among these are the requirements to have a range of signalling and navigational equipment, charts and the International Code of Signals. The presence and operability of such equipment on board a ship should be included as a fundamental component of the vessel's seaworthiness.

¹¹⁶ Submission No.46

12.13 The *Navigation Act 1912*, in Divisions 6, 6A and 7 of Part IV, requires all ships to be equipped with distress signalling equipment, radio equipment and compasses and provides substantial penalties for taking a ship to sea without the prescribed equipment. There is provision for a person to be liable to pay compensation for losses as a consequence of sending an improper distress signal. Equipment is required to be maintained and tested and a ship is not permitted to sail without a sufficient complement of persons qualified to use radio equipment. AMSA may detain a ship that is not carrying the required complement of radio operators. A ship not carrying a compass is deemed unseaworthy and may be detained under the unseaworthiness provisions of the Act. There is a power to make regulations concerning navigational safety equipment and distress signals. These provisions should be retained.

Reporting of Hazards and Position

12.14 In the interests of safety of navigation it is important that the master of a ship sends information on all direct dangers to navigation encountered during a voyage to all ships in the vicinity and to the nearest shore authorities. This may include hazardous objects or dangerous weather. Such information assists other vessels to avoid hazards and assists shore based authorities to repeat warnings and to prepare for search and rescue actions if required. This obligation is achieved under s 269A, Division 13, Part IV of the *Navigation Act 1912*.

12.15 Under Division 13, Part IV of the *Navigation Act 1912*, a master also is required to report on any accidents or incidents occurring to the ship. An owner is required to report the loss or suspected loss of a ship. The duty to report accidents and incidents assists investigations by the authorities and enables authorities to determine if an inspection of any serious damage is required or to organise search and rescue efforts.

12.16 Division 14, Part IV requires the reporting of movements of ships, including departures and arrivals at a port, position reports en route and intended sailing plans. The Division provides for offences for failing to comply with the reporting requirements and for the Australian Maritime Safety Authority to grant exemptions from the requirements.

12.17 All of these provisions contribute to the safety objective and should be retained.

Obligation to Render Assistance

12.18 Section 264 places an obligation on the masters of ships involved in a collision to render assistance to the other ship and to exchange details of the ship, its homeport and next port of call. Subsection 264(3) abolishes the statutory presumption of fault, again by reference to the Merchant Shipping Act.

12.19 Under SOLAS 74 there is an obligation imposed on the master of a ship at sea to proceed with all speed to the assistance of persons in distress, upon receiving a signal from any source that the ship, aircraft or survival craft is in distress. Australia is a contracting government to this convention and should continue to make legislative provision for this obligation.

12.20 The *Navigation Act 1912* provides in ss265 for the master of an Australian ship to proceed to render assistance, subject to a penalty of \$10,000 and/or imprisonment for 4 years unless it is unreasonable or unnecessary to do so. It also provides for the master of any ship or aircraft in distress to requisition ships best able to render assistance and for the master of an Australian ship to comply with the requisition, subject to a penalty of \$20,000 and/or imprisonment for 10 years.

12.21 SOLAS 74 also requires contracting governments to provide for search and rescue of persons in distress at sea within their defined area of responsibility. The *Navigation Act 1912* ss296-298 makes provision for assistance to be given to persons in distress “at any place on or near the coast of Australia” by the Receiver of Wrecks. The role of the Receiver in assisting persons in distress is now redundant in light of modern search and rescue arrangements and should be repealed (see Chapter 22). In coastal areas, search and rescue is undertaken by State emergency services or volunteer coastguards, while in more remote parts of the oceans available shipping or the defence forces may also be used.

12.22 General coordination of air and sea search and rescue is undertaken by the AusSAR centre within the Australian Maritime Safety Authority. AusSAR operates under a general provision in s6(b) of the *Australian Maritime Safety Authority Act 1990*, which defines the functions of AMSA to include provision of a search and rescue service. There is no specific mention of international convention obligations for search and rescue in either the *Navigation Act 1912* or the *Australian Maritime Safety Authority Act 1990*, although s7 of the AMSA Act provides that the Authority must perform its functions in a manner consistent with the obligations of Australia under any agreement between Australia and another country.

12.23 As this obligation is related to the functions of AMSA rather than being an operational matter for shipping, it would be more appropriate for any specific search and rescue regulations to be made outside the *Navigation Act 1912*. Repeal of the redundant Receiver of Wrecks’ role would not affect the operation of AusSAR or State and Territory emergency services.

Marine Pollution

12.24 The MARPOL Convention prescribes the operational discharge of various forms of pollution from ships, as well as some aspects of accidental pollution. In Australian law, these aspects of ship operations are principally covered under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. The *Navigation Act 1912* gives effect to ship certification and inspection aspects of MARPOL related to the ship’s structure and equipment. These aspects are dealt with in Chapter 11.

Recommendations

36. The legislation should clearly indicate that the person in charge of a ship has responsibility for the safe navigation of the vessel at all times, including when under pilotage or subject to vessel traffic control measures. It should require the person in charge of the ship to navigate and operate the ship in a safe and responsible manner in all circumstances.
37. The legislation should continue to enable regulations to be made concerning adoption of the COLREGS convention and for other matters relating to safe navigation of a ship.
38. The legislation should continue to provide for regulations to be made and for offences concerning provision of navigation equipment, distress signals and personnel qualified to operate the equipment.
39. The person in charge of a ship should continue to be required by legislation to assist persons in distress at sea.
40. The legislation should continue to provide for all ships to have charts and navigational equipment suitable for their intended voyage and for officers involved with navigation to have access to the charts. Revisions to SOLAS concerning adoption of electronic charting technologies should be encompassed within the revised *Navigation Act 1912*. These provisions should be grouped with other safety related matters.
41. Sections 258(5), requiring assessors with nautical experience at court hearings, and 258A, concerning careful navigation near ice, should be repealed.

13. COASTAL PILOTAGE

Pilot Licensing

13.1 In particularly hazardous areas, a duty to engage a pilot may be an important adjunct to safety of navigation. Pilots must be suitably qualified and knowledgeable about the area in which they work.

13.2 Under Part IIIA of the *Navigation Act 1912*, AMSA regulates the qualifications and duties of coastal pilots. Coastal pilot services are presently only required in the Great Barrier Reef region, including Torres Strait, and are provided by the private sector. The provisions of the Act are expressed not to affect any State or Territory law governing pilots or pilotage in relation to a port in the State or Territory. Port pilots are licensed by State and Territory Governments.

13.3 Section 186C provides for regulations to made in relation to establishing the standards of competence of pilots; conditions to be satisfied and the licensing of pilots; issue, recall and surrender of licences; duration, variation suspension and cancellation of licences; instruction, training and examination; and exemptions or recognition of prior service. The details of regulations for coastal pilots are contained in Marine Orders Part 54. Conditions may include age, health, nationality, citizenship or residence.

13.4 Under s186D, regulations may also prescribe the duties of pilots, professional relationships between pilots, masters and other ship's officers, keeping of records and professional liability. Details of these matters are specified in Marine Order 54.

13.5 It is an offence for an unlicensed person to perform the duties of a licensed pilot (s186E) and for a licensed pilot to consume alcohol or drugs while on board (s186F).

13.6 These regulations are intended to meet safety and environment protection objectives by providing for the establishment of appropriate standards for persons undertaking the duties of coastal pilots. The standards are not restrictive of competition in that any person who possesses the required skills and experience and can satisfy the medical standards will be granted a licence.

13.7 While expressed as applying to "any part of the Australian coastal sea", in practice the licensing of coastal pilots under the *Navigation Act 1912* Part IIIA has been limited to the Great Barrier Reef and Torres Strait region since its introduction. The Great Barrier Reef is recognised nationally and internationally as requiring extraordinary measures for its protection and conservation.

13.8 In 1992 the Queensland Government requested the Commonwealth to assume the role of overseeing the provision of reliable and effective pilotage services in the Torres Strait and the Great Barrier Reef. AMSA took on this responsibility from 1 July 1993. Entry and certification requirements were introduced, including a structured training program.

13.9 In a study of the relative risks of a shipping accident in the Great Barrier Reef and Torres Strait region¹¹⁷, it was found that risk is very sensitive to the presence of a pilot. It was found that there would be considerable benefits from increased use of pilotage services in the region, with an estimated 30% of ships not using a pilot in the Torres Strait, where pilotage is recommended but not mandatory. In the 15 years to 1999 there have been 26 collisions or groundings of trading ships in the Torres Strait and the Great Barrier Reef area. The study noted that mandated pilotage standards, including formal qualifications, experience, training, medical fitness and the effects of fatigue and other human factors were important issues in ensuring high standards of pilotage services.

13.10 A 1994 review of the coastal pilotage arrangements¹¹⁸ found that the regulations in force do provide an appropriate basis to ensure the safe pilotage of ships through the Great Barrier Reef and Torres Strait.

Reporting Deficiencies in Ships

13.11 The 1998 Ship Safe report¹¹⁹ recommended that marine pilots be required to report all serious safety deficiencies aboard ships to the Australian Maritime Safety Authority. In making this recommendation, the committee expressed a concern at the possibility that safety deficiencies were not being reported, due to commercial pressures under a competitive pilotage regime. By making such reporting compulsory, the committee believed that no pilotage firm should be commercially disadvantaged for acting responsibly. This requirement is contained in Marine Order 54 and should be retained.

Commercial Regulation

13.12 The Reef Pilots Association submitted that economic regulation rather than competition will better serve to protect the public interest for safe pilotage services. It was claimed economic regulation protects the public interest by maximising safety, avoiding uneconomic duplication of capital expenses and facilities and enhancing state regulatory oversight. The Association identified the unique features of Australian coastal pilotage, which involve a small pool of pilots operating in remote locations over lengthy distances, and noted that few other countries have deregulated pilot markets. It claimed that Australian pilot productivity is high by world standards, but competition on the Great Barrier Reef routes has reduced the capacity to fund capital replacement, and the drop in average pilot incomes has increased difficulties in attracting new entrants in an ageing pool of qualified pilots.¹²⁰

13.13 It is not the intent of the current regulations to govern the economic and commercial performance of private pilotage services by regulating entry into or

¹¹⁷ Department of Transport (1995) Great Barrier Reef and Torres Strait Shipping Study, Vol II, DOT, Canberra

¹¹⁸ Crone, P (1994) Review of the Coastal Pilotage Regulations for the Australian Maritime Safety Authority, AMSA, Canberra

¹¹⁹ House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform (1998) Ship Safe - An Inquiry into the Australian Maritime Safety Authority Annual Report 1996-97, Commonwealth Parliament, Canberra

¹²⁰ Submission No.41

pricing of the industry to ensure adequate returns to licence holders. Such regulation would be contrary to national competition policy principles.

13.14 A feature of earlier Queensland regulation of pilots was the power to control the number of licensed pilots, the price of pilotage services and the operations of pilot services. The Commonwealth Government made clear at the time of agreeing to regulate coastal pilot standards that it considered it was not appropriate for government to directly control the supply or pricing of pilot services. Appropriate mechanisms for reviewing these aspects were considered to be available through the Trade Practices Commission and the Prices Surveillance Authority (PSA).

13.15 Such a review was conducted by the PSA in September 1993¹²¹, which endorsed the Commonwealth Government's approach, concluding that many users had benefited from significant reduction in charges (around 20%) without compromising ship safety and there had been a marked increase in the transparency, simplicity and negotiability of charges. This was largely a reflection of improved competition, assisted by the emergence of two pilotage companies with a greater customer focus to their operations.

13.16 The 1994 Crone review also considered claims that the lack of commercial regulation compromised safety in the region. It concluded that, provided appropriate safety audit and control mechanisms are in place and functioning, there is no evidence to suggest that the absence of direct commercial regulation poses a threat to the safety of the Great Barrier Reef and Torres Strait. It also found no evidence of a shortage of suitable applicants for coastal pilot licences.

13.17 In late 1999, AMSA commissioned a further review of pilotage services in the Great Barrier Reef. The review does not expect any significant changes to the main parameters of the existing pilot licensing scheme.

Pilotage in the Great Barrier Reef

13.18 The requirements for compulsory pilotage on the Inner Route of the Great Barrier Reef Marine Park are contained in Part VIIA of the *Great Barrier Reef Marine Park Act 1975*. The requirements apply to all vessels of 70 metres or more in length and all loaded oil tankers, chemical tankers or liquefied gas carriers, regardless of length.

13.19 This provision was originally made to enhance the chances of success in gaining IMO approval for the compulsory pilotage regime by attaching it to environmental protection legislation. The compulsory pilotage regime in the Great Barrier Reef Marine Park region has now been in place since 1991.

13.20 AMSA is responsible for the technical assessment of applications to the Great Barrier Reef Marine Park Authority for temporary exemptions from pilotage received under the *Great Barrier Reef Marine Park Act 1975*. The Chair of the Great Barrier Reef Marine Park Authority is currently the designated authority for approving compulsory pilotage exemptions. The Great Barrier Reef Marine Park Authority has

¹²¹ Prices Surveillance Authority (1993) Inquiry into Pilotage Services in the Great Barrier Reef, Report No. 50

submitted to the review that it would be more appropriate now for AMSA to directly have this authority, as AMSA performs the majority of the assessment task and has the technical expertise. This could be achieved by delegation under the *Great Barrier Reef Marine Park Act 1975* or by placing the exemption provisions in the revised *Navigation Act 1912*.¹²²

13.21 It would be undesirable to separate the requirement for compulsory pilotage and the exemption from this requirement in two separate Acts. The Great Barrier Reef Marine Park Authority advised that it would prefer provisions allowing the Great Barrier Reef Marine Park Authority to declare pilotage areas to be retained in its own legislation, although it would make appropriate delegations to AMSA on the question of exemptions. The Authority argues that direct accountability to the Australian public and the Commonwealth Parliament for protection of the World Heritage values of the Park rest within the *Great Barrier Reef Marine Park Act 1975*.¹²³ The review considers, however, that AMSA should have full responsibility for declaring areas where pilotage is compulsory and for making exemptions from this requirement under the revised *Navigation Act 1912* for reasons of national consistency and avoiding duplication of regulation (see below). In the immediate future, until this provision can be enacted, it would be appropriate for the exemption provision to be delegated to AMSA under the *Great Barrier Reef Marine Park Act 1975*.

Declaration of Pilotage Areas and other areas requiring special navigation measures

13.22 The *Navigation Act 1912* currently makes no provision for AMSA to declare any areas where coastal pilotage is required, nor does it clearly provide for the introduction of a range of other mandatory measures for safe navigation, such as vessel traffic monitoring or traffic separation systems. With increasing traffic and concern for environmental protection and vessel safety, it is foreseeable that there may be a requirement to implement vessel traffic control and pilotage measures in more regions. It would be desirable to have appropriate national legislation in place to implement any necessary measures as the need arises.

13.23 The IMO has endorsed a number of methods for managing the movement of shipping traffic which coastal states can implement. These traffic management methods are designed to contribute to safety of life at sea, safety and efficiency of navigation and protection of the marine environment through safer navigation. They include such measures as mandatory or recommended coastal pilotage, vessel traffic separation and reporting systems, and ship routing systems. The IMO is developing a new Chapter to SOLAS which outlines the various measures and obligations of contracting parties for implementing them. Australia implemented a mandatory reporting system for the Great Barrier Reef on 1 January 1997 under its general powers to make Marine Orders for safety of navigation. It would be preferable for there to be specific powers in the Act for such measures. Australia's domestic legislation should make specific provision for the adoption and implementation of such measures, as required.

¹²² Submission No. 22

¹²³ Correspondence 12 May 2000 and 7 June 2000.

13.24 To ensure consistency with international obligations concerning the free movement of shipping, it is important that any such measures introduced by Australia are consistent with the guidelines endorsed by the IMO. In seeking to designate areas for special navigation measures within the territorial sea, Australia is not obliged to obtain prior IMO approval, but must take into account any recommendations of IMO as well as any channels customarily used by international shipping, any special characteristics of particular ships or channels and the density of traffic. For measures proposed in international straits and the EEZ, IMO approval and assistance would be required in line with procedures stipulated in UNCLOS.¹²⁴ Australia sought and obtained prior IMO endorsement of the measures introduced in the Great Barrier Reef region.

13.25 It would be preferable for the revised *Navigation Act 1912* to prescribe such measures rather than to rely on multiple region-specific laws or more general environmental legislation. It would be in keeping with the safety and environmental protection objective of the revised *Navigation Act 1912* for AMSA to be empowered to prescribe areas requiring special navigation measures, including coastal pilotage. AMSA is the competent authority for determining any special technical navigation needs and would be best placed to ensure that any such measures are introduced consistently with internationally agreed procedures and rules.

13.26 Regulation should take the form of a power within the revised *Navigation Act 1912* for the Authority to declare, alter or revoke areas within Australian waters which require specified navigation measures, including coastal pilotage, vessel traffic reporting and information systems, vessel separation systems and ship routing systems. The power would need to be exercised consistent with any international convention commitments and must be related to safety of shipping and marine environmental protection. The Authority would also have the power to exempt any particular vessel/master from the above requirements if in its opinion this would not adversely affect safety or environmental protection. The detail of provisions or requirements would be made under Marine Orders, providing a flexible and responsive means of implementing measures without the need for major legislative amendments.

13.27 Environment Australia supported inclusion in the revised Act of a power for AMSA to declare compulsory pilotage areas, and suggested that it would be useful to extend the application of the Act to the 200 nm limit of the EEZ and the limit of the claimable continental shelf (350 nm), to allow specification of navigation routes for shipping.¹²⁵ Specification of navigation routes must be considered in the context of the rights of innocent passage and freedom of the high seas contained in UNCLOS, as noted above.

13.28 Liner Shipping Services Ltd supported AMSA having delegated power under the *Great Barrier Reef Marine Park Act 1975* to issue exemptions from compulsory pilotage in that region, but that legislation for AMSA to declare any areas as proposed should include a requirement for AMSA to hold prior consultations with affected parties.¹²⁶ Commonwealth policy already requires all departments and agencies to

¹²⁴ Department of Transport (1995) Great Barrier Reef & Torres Strait Shipping Study, Part Three.

¹²⁵ Submission No. 20

¹²⁶ Submission No. 49

follow regulatory principles in developing and amending legislation and regulations. These principles include mandatory consultation with affected parties, other Departments and the general community. In accordance with s12 of the *Australian Maritime Safety Authority Act 1990*, AMSA has established processes and forums for consultation with the shipping industry on the full range of its activities, and these could readily encompass any new powers for declaring pilotage or other special navigation areas. A specific legislative requirement in the revised *Navigation Act 1912* is not necessary.

Recommendations

42. The current requirements for licensing of pilots should be retained in the revised Act and grouped with other safety related matters.
43. Offences in relation to use of drugs and alcohol while a pilot is on board a ship and performing pilot duties should be retained.
44. AMSA should have full responsibility for declaring areas where pilotage or other vessel traffic management or special navigation or reporting measures are compulsory and for making exemptions from these requirements under the legislation, including within the Great Barrier Reef Marine Park region.
45. Pending amendment of the *Navigation Act 1912*, AMSA should be delegated power under the *Great Barrier Reef Marine Park Act 1975* to issue exemptions from compulsory pilotage in the Great Barrier Reef Marine Park region.

14. SHIP CERTIFICATION AND SURVEY

14.1 Three IMO conventions, SOLAS, MARPOL and the Load Line Convention, specify standards for ship design, construction, operation and maintenance. These require flag State signatories to ensure that the ships registered under their flags are issued with certificates to confirm that they meet the conventions' requirements. Flag States are required to have a system of inspection and survey of their flag ships to ensure that the required standards are met before their certification. This can be undertaken by officers of the Flag State Administration, nominated surveyors or organisations recognised by the Administration.

SOLAS

14.2 The SOLAS convention includes detailed requirements in relation to stability, machinery, fire protection and fire equipment, life saving appliances, radio equipment including satellite distress communication systems, and carriage of particular cargoes including dangerous goods. It also includes general requirements for ship construction, machinery and electrical equipment, the details of which are contained in the rules of the classification societies.

14.3 In general, SOLAS applies to cargo ships of 500 gross tonnes or more and to all passenger ships engaged on international voyages. The Convention also calls up a number of codes, some of which are mandatory. It requires a flag State to ensure that the ships registered under its flag comply with convention standards and prescribes a number of certificates to be issued confirming that ships meet these requirements.

14.4 The *Navigation Act 1912* contains numerous provisions giving effect to the various chapters in SOLAS and currently some 20 parts of Marine Orders implement aspects of the convention, as summarised in Table 14.1.

14.5 Division 1 of Part IV of the *Navigation Act 1912* provides in section 187 that all ships to which the Part applies are liable to inspection and survey. Section 190B provides for regulations to be made specifying the requirements with which the construction, hull, equipment and machinery of a ship must comply and for the survey and inspection of ships. Section 191 allows regulations to be made giving effect to the SOLAS Convention.

14.6 Division 2, 2A and 2 B of Part IV of the *Navigation Act 1912* concerns the survey of ships and issue of survey certificates. Section 193 requires the shipowner to have the relevant part of the ship to be surveyed at least once every twelve months or longer period as prescribed by regulation. Section 194 outlines the process whereby a surveyor provides AMSA with a survey report and makes a declaration where appropriate about the basis on which a certificate may be issued. The Act allows AMSA to issue, or if not satisfied that the ship complies with a requirement of the Act, refuse to issue, a certificate of survey, a passenger certificate or certificates of equipment.

14.7 Section 195 provides that a certificate to remain in force for the period prescribed by regulations and allows for AMSA to extend this period in certain circumstances. Section 195A provides for a certificate to cease having effect if the ship ceases to be registered in Australia. Section 196 requires a copy of the certificate

of survey to be available to any person on board the ship. A penalty of a fine of five penalty units is imposed for contravention.

14.8 Marine Orders Part 31, Ship Surveys and Certification, prescribes matters relating to the survey, inspection and certification of ships for the purposes of Part IV and to give effect to Chapter I of SOLAS. It allows surveys to be performed by persons appointed under section 190 of the Act or by a person employed as a surveyor or by a survey authority as defined by the Act.

MARPOL

14.9 The MARPOL convention deals with the standard of construction and equipment of ships and with ship operational practices in relation to preventing intentional pollution from disposal of oil, noxious liquids, harmful packaged substances and garbage, other than by dumping at sea.

14.10 The convention has six annexes dealing with each potential source of marine pollution:

- Annex I, Prevention of Pollution by Oil, is mandatory for parties to the convention and prescribes criteria for the discharge of oil and oily waste. It requires ships carrying oil to be fitted with approved equipment for retaining oily wastes on board for discharge at shore facilities. Oil tankers are required to have separate ballast tanks of a capacity to preclude carrying ballast water in oil cargo tanks. They also are required to meet certain structural and stability criteria to resist damage from collision or stranding. Areas of special environmental significance are recognised where no discharges of any type are permitted (eg in Australia, the Great Barrier Reef region).
- Annex II, Control of Pollution by Noxious Liquid Substances, also is mandatory for parties to the Convention. It applies to all ships carrying substances in bulk and provides criteria for their discharge and measures to control pollution. It lists 250 substances which are required to be discharged only to onshore facilities unless certain concentrations and conditions are met and then not within 12 miles of land. It makes compulsory the Bulk Chemical Code which specifies carriage requirements for chemicals in bulk.
- Annex III, Prevention of Pollution by Harmful Substances in Packaged Forms is optional for parties to the Convention. Australia has ratified Annex III. It requires specific packaging and stowage requirements to be met for such substances and compliance with other standards detailed in the International Maritime Dangerous Goods Code. Discharge of harmful substances covered by Annex III is totally prohibited in any area except where safety of the ship or life is involved.
- Annex IV, Prevention of Pollution by Sewage, is optional for parties to the Convention and is yet to come into force internationally. It prohibits ships from discharging sewage waste including from the carriage of live animals and retention on board in holding facilities. These facilities are to be surveyed periodically and certificated.

- Annex V, Garbage, is optional for parties to the Convention. Australia has accepted Annex V. It allows controlled discharge on the high seas of some forms of garbage, including glass, metals, timber and food wastes. It completely bans dumping into the sea of all forms of plastic. Otherwise garbage has to be retained on board for disposal by approved methods.
- Annex VI, Prevention of Air Pollution from Ships, is optional for parties to the Convention and is yet to come into force internationally. It sets limits to the level of sulphur oxide and nitrogen oxide emissions from ships' exhausts and prohibits deliberate emissions of ozone depleting substances. This involves use of fuel oil with restricted sulphur content or fitting of ships with an exhaust gas cleaning system. Provision is made for survey and certification of ships in relation to air pollution prevention equipment.

14.11 The aspects of the MARPOL Convention dealing with ship operations are given effect in Australia principally through *the Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. The Act does not give force of law to the MARPOL Convention itself, but each part of the Act implements the separate obligations imposed on Australia as a Party to the Convention. The master and shipowner are guilty of an offence where the discharge was not to secure the ship's safety or saving life, or the discharge occurred because of damage to the ship or its equipment, other than intentional damage. A duty is imposed to report discharge incidents and it is an offence not to do so.

14.12 The ship construction and equipment aspects of MARPOL are given effect by the *Navigation Act 1912* in Divisions 12, 12A and 12B of Part IV. These provide for the issue of relevant ship certificates and cover the control of foreign ships not constructed in compliance with the convention. Division 12 deals with ships carrying or using oil and implements aspects of Annex I to the convention. Section 267A allows the making of regulations in relation to Regulations 13 to 19 and 22 to 25 in the MARPOL Convention. Marine Orders Part 91, Marine Pollution Prevention – Oil, includes provisions made pursuant to both section 267A of the *Navigation Act 1912* and section 34 of *the Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, which allows AMSA to make Marine Orders pursuant to that Act.

14.13 Division 12A of the *Navigation Act 1912* deals with ships carrying noxious liquid substances in bulk and implements aspects of Annex II to the Convention. Section 267P allows the making of regulations giving effect to Regulation 13 of Annex II. Marine Orders Part 93, Marine Pollution Prevention – Noxious Liquid Substances contains provisions made pursuant to both section 267P of the *Navigation Act 1912* and section 33(1)(a) of *the Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, which allows regulations to be made pursuant to that Act.

14.14 Division 12B of the *Navigation Act 1912* deals with ships carrying packaged harmful substances and implements aspects of Annex III of the Convention. Section 267ZC allows the making of regulations giving effect to Regulation 1 to 6 of Annex III. Marine Orders Part 94, Marine Pollution Prevention – Packaged Harmful Substances contains provisions made pursuant to both section 267ZC of the *Navigation Act 1912* and ss26AB and 26B of *the Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

14.15 Marine Orders Part 95, Marine Pollution Prevention – Garbage are made exclusively pursuant to section 33 (1)(a) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

14.16 Sections 267K of Division 12 and 267Y of Division 12A provide AMSA with the power to direct that a foreign ship not enter a port or use any offshore terminal if it is of the opinion that it is not constructed in accordance with MARPOL. Similarly, AMSA has the power to require a foreign ship to comply with specified requirements when entering or leaving a port or terminal. These powers can only be used for the protection of the environment.

14.17 MARPOL deals with two distinct areas of marine pollution control. The first concerning the certification of structural and stability requirements for particular types of ships and the equipment required on a ship to retain its wastes and minimise the risk of marine pollution. Currently, this part of the convention is implemented through the *Navigation Act 1912*. The second area concerns the operational aspects of the convention, such as the keeping of a ship's oil record book, permissible oil discharges, and use of port reception facilities for wastes, which are implemented through the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

14.18 While the current arrangements mean that two pieces of legislation are giving effect to the one international convention, the review considers that this is a convenient allocation of the two distinct aspects of MARPOL. The certification part is compatible with the other certification provisions in the *Navigation Act 1912* and its inclusion in the Act provides comprehensive coverage of the construction and equipment requirements of ships for ease of reference by the industry. The legislation should continue to implement MARPOL requirements in relation to ship survey and certification.

14.19 AMSA advised that the division of the Convention's implementation between the two Acts has caused confusion to some users of the legislation, particularly the complex application provisions in the *Navigation Act 1912*. It is anticipated that these difficulties will be reduced with the restructuring of the legislation and its focus on the objective of ship safety and marine environment protection.

Load Line Convention

14.20 The International Convention on Load Lines 1966 requires ships to which the convention applies to have been surveyed, marked and provided with an International Load Line Certificate confirming the limitations on the draught to which a ship may be loaded. The Convention includes detailed regulations for determining load lines, the form of load line marks and their positioning on the side of a ship and for maintaining the external weathertight and watertight integrity of the ship. It prohibits the submersion of the load line relevant to the season and global zone for the ship's voyage and requires the master of every ship to be supplied with stability information for the ship.

14.21 The *Navigation Act 1912* in Division 5, Load Lines, in Part IV includes provisions giving effect to the Load Line Convention. Sections 222 to 226 concern the issue of load line certificates. Section 227A prohibits the master or shipowner of an Australian registered ship from going to sea unless it is issued with a load line

certificate. Section 227B provides for offences if a ship goes to sea that is overloaded. Section 227C allows ships to be detained if the load lines are incorrectly marked on the ship and section 22D provides for offences in relation to alteration of load line markings. Section 227E allows for AMSA appointed surveyor to inspect a foreign flag ship to which the Load Line Convention is applicable. This is to ascertain if the ship is overloaded, its load lines are marked correctly, there has been no material alteration to the ship since its marking, fittings and appliances comply with the Convention and the ship's condition complies with its Load Line Certificate.

Harmonisation of Survey Requirements

14.22 The survey of ships for the purposes of meeting the requirements of the three conventions, SOLAS, MARPOL and the Load Line Convention, can involve vessels being out of service for some time. A harmonisation system has been introduced by the IMO aimed at ensuring the survey dates and intervals between surveys coincide so that relevant ship surveys required under all three conventions can be carried out within a stipulated timeframe.

The Role of Classification Societies in Ships Certification

14.23 Before the development of the major maritime international conventions, classification societies already had established classification rules providing a set of comprehensive standards for ships' hull structures and essential shipboard machinery systems. These had grown from the needs of eighteenth century insurance underwriters to have an independent means of assessing the soundness of each ship to determine the level of risk and the appropriate premium involved with insuring the vessel and its cargo.

14.24 Classification societies publish their own detailed rules for hull structural design and essential shipboard machinery systems that have worldwide application in the approval of plans, testing of materials and survey and inspection during the construction of ships. The SOLAS and Load Line Conventions do not contain detailed requirements for these items. The classification societies also lay down requirements for the periodic surveys of a ship's hull, machinery and equipment with which compliance is a condition of maintaining a ship's classification status.

14.25 The classification rules complement and amplify the standards stipulated in international conventions which allow administrations to recognise nominated classification societies as organisations which inspect and survey their flag ships to verify that their construction and ongoing standard meets convention requirements. A classification society also may be authorised by the flag State to issue statutory certificates on its behalf confirming its flag ships' compliance with these standards. While a flag State administration may delegate these statutory functions to classification societies, it retains full responsibility under the conventions for ensuring its flag ships' compliance with convention requirements as implemented in its national laws. Classification societies so authorised by flag states should comply with IMO Resolutions A.739(18) and A789(19).

14.26 The larger classification societies have formed the International Association of Classification Societies (IACS) which has consultative status as a non-governmental

organisation at the IMO and as such contributes to the development of major international conventions and associated requirements.

14.27 In relation to Australian-registered ships, AMSA currently delegates its ship survey and certification responsibilities under the *Navigation Act 1912* to six approved classification societies, which are all full members of the International Association of Classification Societies. This delegation authorises the societies to perform statutory survey and certification work on behalf of AMSA in accordance with the applicable requirements of international conventions. The choice of which of the six classification societies performs statutory survey and certification work is left to the individual ship owner. However, AMSA has retained responsibility for undertaking all audit and verification work associated with statutorily required compliance with the International Ship Management (ISM) Code.

14.28 AMSA has entered into a memorandum of understanding (MOU) with each approved classification society that details the respective obligations and responsibilities of each party. The MOU includes provision for AMSA to audit activities carried out by the societies on its behalf under the terms of the agreement to ensure that the requirements of the relevant international conventions and codes are being met. AMSA also undertakes a Flag State inspection program for Australian flag ships, similar to its Port State Control inspections of foreign flag ships in Australian ports.

14.29 The *Navigation Act 1912* in section 187BA allows AMSA to approve a standard of classification certificate issued by a survey authority. Other provisions allow AMSA or a survey authority to issue a ship with a cargo ship safety construction certificate (section 206E), as required by SOLAS, a ship construction certificate (section 267B) or a chemical tanker construction certificate (section 267Q) as required by MARPOL, a load line certificate (section 222) or a tonnage measurement certificate (section 405F).

14.30 The legislation should continue to recognise the role of classification societies in the survey and certification of ships, as provided by international conventions and in accordance with international practice.

Accommodation

14.31 Shipboard accommodation standards can have a direct effect on the alertness and health of crews and therefore impact on the safety of ship operations. Accommodation needs to provide satisfactory security, protection from the elements and insulation from heat, cold, noise and emissions from other parts of the ship including engine, machinery and cargo spaces. It must have satisfactory drainage, ventilation, heating, and lighting and provide sufficient space for crew members.

14.32 ILO Convention No. 92, Accommodation of Crews (Revised) 1949, contains detailed provisions setting minimum standards for the location, construction, arrangement, equipment and facilities for crew accommodation on seagoing ships of 500 gross tons or more. This includes sleeping rooms, sanitary facilities, mess and recreation rooms and hospital spaces.

14.33 It requires plans to be submitted to the competent authority for approval of crew accommodation before construction of a new ship or alteration to an existing ship. The competent authority also may inspect crew accommodation to ensure it complies with legal requirements when a ship is registered, substantially altered, or there is a complaint by a trade union or crew members about non-compliance with legal requirements. An inspection of crew accommodation is required to be carried out by a ship's officer at least weekly and the results recorded.

14.34 The convention requires the competent authority to consult with ship owners and maritime unions in framing regulations to give effect to the convention. It also allows for variations of its standards if in consultation with shipowners and maritime unions these are found to be not less favourable than the convention. Nothing in the convention affects any law, award, custom or agreement between shipowners and seafarers that ensures more favourable conditions than those provided by the convention.

14.35 ILO Convention No. 133 Accommodation of Crews (Supplementary Provisions) 1970, upgrades and updates the standards in ILO Convention No. 92 which are to apply to ships of 1000 gross tons or more. It requires each participating Member State to maintain laws or regulations to ensure its application, define persons responsible for compliance, prescribe adequate penalties and provide for an inspection system to ensure effective enforcement.

14.36 Australia is a party to both ILO Conventions No. 92 and No. 133. They are given effect in section 136 of the *Navigation Act 1912*, which allows regulations to be made prescribing accommodation for ship's crew and give effect to the conventions. The section allows the provisions of the conventions to be applied to classes of ships other than those prescribed by the conventions. Section 137 makes particular provision for AMSA to require shipowners to provide ventilation of machinery and boiler spaces of a ship and a wheelhouse or shelter for the helmsman.

14.37 Marine Orders Part 14, Accommodation, implements these ILO Conventions. Some industry submissions commented that the standards included in Marine Orders Part 14 for accommodation exceed those prescribed by the ILO conventions.¹²⁷ These higher standards recognise to some degree a level of amenities consistent with Australian community norms, but they also have been influenced by industrial agreements for more favourable conditions made between shipowners and maritime unions, as permitted by the convention. The ILO conventions provide for consultations with shipowners and maritime unions in developing appropriate regulations to implement the accommodation conventions. Other OECD countries also require standards of accommodation greater than ILO minima, reflecting their own community expectations. Australian community expectations also would require standards of accommodation above the ILO minima and more akin to those of other OECD countries.

14.38 The shipping industry strongly argued that shipping legislation should separate health and safety requirements from industrial arrangements by prescribing only the ILO standards for accommodation. Higher standards that would address Australian

¹²⁷ Submission Nos. 7 and 13, and industry workshops Melbourne 10 September 1999 and Sydney 22 September 1999

community expectations, relative to the nature of the ship's operations, should be a matter for negotiation at the enterprise level and be reflected in industrial agreements. Industry representatives argued that most employers would adopt standards in excess of ILO minima in industrial agreements in order to attract and retain staff. Reference to ILO standards in the legislation would provide a common benchmark for AMSA to inspect both Australian and foreign ships. If higher standards than the ILO requirements are considered essential, then Australia should be promoting these at the international level for global adoption. It was also noted that the delegation of survey functions to classification societies will tend to reduce differences in the application of standards to Australian ships. In addition to ILO standards, Australian employers must address OH&S requirements under other ASO standards, which are used as a test of whether due care is being taken in providing a safe and healthy working environment.¹²⁸

14.39 Accommodation standards are an aspect of ship safety, which should be included in that Part of the Act and assessed as contributing to the seaworthiness of any ship. It would be consistent with the philosophical approach adopted by the review that the Act and Marine Orders should be recast to reflect a performance based requirement for owners to provide adequate accommodation to ensure the health and hygiene and reasonable social amenity of all persons on board sufficient for the nature of the intended voyage, with guidance provided by reference to IMO, ILO and relevant other bodies of standards.

14.40 It would be necessary that Marine Orders continue some prescriptive elements, reflecting ILO convention obligations for minimum standards. For example, Marine Order 14 already reflects Article 5.4 of ILO133 that "The number of ratings occupying sleeping rooms shall not exceed two persons per room, except in passenger ships where the maximum number permissible shall be four". However, any standards that go beyond those specified in international conventions should be left to negotiation between parties. AMSA would be able to approve alternative standards agreed between parties, consistent with the convention provisions allowing for negotiation between shipowners and unions for standards that are not less favourable than those in the conventions.

Tonnage Measurement

14.41 The international system for standardised measurement of a ship's tonnage is related to safety regulation, as most safety conventions are only applicable to vessels above a certain tonnage. The correct calculation of tonnage also is important in the application of port dues and fees and other levies. It is relevant to the establishment of limits to liability under the Convention on Limitation of Liability for Maritime Claims, which is scaled according to the gross tonnage of vessels calculated in accordance with the Tonnage Convention.

14.42 The International Convention on Tonnage Measurement of Ships 1969 established uniform principles to calculate tonnage of ships engaged on international voyages. It requires that each ship is issued with an International Tonnage Certificate attesting to the assessment of its gross and net tonnages in accordance with the principles contained in the Convention. It also allows for the inspection of ships in

¹²⁸ Industry workshops, Sydney 6 April 2000, Brisbane 7 April 2000, Melbourne 12 April 2000

the ports of contracting States to verify that each carries an International Tonnage Certificate and to ensure that the ship's characteristics comply with the data on the Certificate.

14.43 Australia is a party to the Tonnage Convention and Sections 405B to 405P of the *Navigation Act 1912* implement its requirements. Provision is made for the assessment of the tonnage of internationally voyaging ships in accordance with the Convention and for the issue of an International Tonnage Certificate. The *Navigation Act 1912* also provides for the issuing of tonnage certificates on behalf of overseas administrations, and for AMSA to request an overseas administration to issue a tonnage certificate on its behalf. These arrangements facilitate trade by providing flexibility to business in receiving or renewing tonnage certificates at convenient times during their voyages, without the need to return to their flag State where a tonnage certificate needs re-issuing when a ship's particulars change. In practice, AMSA has delegated tonnage measurement work under this convention to the six approved classification societies.

14.44 The *Navigation Act 1912* also makes provision for tonnages to be assigned to a vessel otherwise than under the measurement procedures of the Tonnage Convention. This provision recognises that there is a need to know the tonnage of all vessels, for example in applying levies and fees to such vessels to ensure they make a contribution towards the costs of navigation aids, ports facilities and other services. However, it is not necessarily appropriate to subject vessels to the same procedures as set out in the convention, which could impose a significant cost on small vessel operators when an acceptable alternative is available. Marine Order Part 3, for example specifies tonnage to length equivalents for the purposes of the STCW convention.

14.45 The Tonnage Convention should continue to be recognised in the legislation. As the certification and inspection procedures are similar those for the other certificates required under the Act, the requirement should be grouped with the general certification provisions. The legislation should allow for the use of approved classification societies in this respect whilst retaining provisions for mutual arrangements between AMSA and overseas administrations to recognise certificates by or on each other's behalf, together with mechanisms to assign tonnage for non-convention ships.

Torremolinos Convention

14.46 The safety regulation of fishing vessels is covered by both Commonwealth and State jurisdictions. Australian fishing vessels of all sizes operating within Australian waters come within the regulatory regime of the States and Northern Territory. All Australian fishing vessels proceeding on an overseas voyage and all foreign fishing vessels within Australia's territorial waters or visiting Australian ports come within the Commonwealth regime.

14.47 There are no specific safety standards for fishing vessels coming within Commonwealth jurisdiction. Fishing vessels are covered by the *Navigation Act 1912* for survey and the requirements for issue of safety certificates are the same as for cargo ships. The standards applying to cargo ships are not generally appropriate to

fishing vessels and there is a need to improve control of these vessels through a regulatory regime specifically designed to address their operations.

14.48 Adoption of internationally agreed standards for fishing vessels would be appropriate in view of the increasing numbers of foreign fishing vessels operating in Australian waters. The Torremolinos International Convention for the Safety of Fishing Vessels 1977 and its revising Protocol of 1993 apply to fishing vessels of 24 metres or more in length and set standard for the structure and equipment to be carried on fishing vessels. It also provides for Port State Control measures for certification, inspection and detention. The standards in the convention are acceptable to Australia, and adoption of the convention provisions would clear the way for Australia to ratify the convention. Australian shipping legislation should incorporate the provisions of the Torremolinos Convention.

14.49 The Department of Agriculture, Fisheries and Forestry, Australia (AFFA) supports the adoption of the convention and its 1993 Protocol. AFFA also noted it would be useful to include in the revised *Navigation Act 1912* a schedule of all provisions that apply to fishing vessels, including those relating to COLREGS, MARPOL and SOLAS.¹²⁹ Transport South Australia (TSA) supported the proposed adoption of the Convention into Commonwealth legislation, but noted that the convention applies to vessels of greater than 24 metres, which is inconsistent with the proposal to bring all non-trading vessels under 500 Gross Tons (35 metre equivalent length). Transport SA also noted that adoption of the Convention may affect the work of the National Marine Safety Committee in developing its National Standards for Commercial Vessels.¹³⁰ These are valid observations, which should be taken into account in consultations between the Department of Transport and Regional Services and the States and Northern Territory as new Commonwealth legislation is being developed.

Non-Convention Vessels

14.50 Not all vessels subject to Commonwealth regulation are required to meet safety standards established under international conventions. Generally speaking, international conventions apply to ships above various tonnage limits and which are engaged on international voyages. Under arrangements agreed by the Australian Transport Council, the Commonwealth's responsibilities for regulating trading ships will be aligned with the 500 GT limit specified for the SOLAS Convention.

14.51 However, it is possible that other ships will continue to be regulated by the Commonwealth, and a set of relevant standards suitable for such ships is required. For business efficiency, any standards applied by the Commonwealth should be consistent with those applied under State or Territory vessel safety regimes. Commonwealth shipping law should continue to provide for application of standards to non-convention sized vessels, consistent with the Uniform Shipping Laws Code, or the National Standards for Commercial Vessels when this is endorsed by the Australian Transport Council.

¹²⁹ Submission No. 51

¹³⁰ Submission No. 70

Recommendations

46. The legislation should continue to provide that all ships covered by the Act should comply with the SOLAS, MARPOL, Tonnage and Load Line Conventions and ILO Convention Nos. 92 and 133, Accommodation of Crews or, if non-convention ships, with the relevant regulations under the USL Code or the proposed National Standard for Commercial Vessels.

47. The legislation should impose a duty on persons designing, building, manufacturing, repairing, certifying and owning ships and ship's safety equipment to ensure that they act in accordance with its requirements.

48. Accommodation standards should be included in the requirements of the legislation for ship design, construction and maintenance.

49. AMSA should continue to have power to issue relevant certificates and to authorise survey authorities to issue Australian certificates.

50. The legislation should continue to include the power to make regulations in relation to ship survey, certification and inspection and for the certification of ship's construction and equipment aspects of the MARPOL Convention.

51. The legislation should continue to provide for tonnage measurement and certification of convention and non-convention size ships.

52. The legislation should retain AMSA's powers to direct ships that are believed not to be constructed in accordance with MARPOL and these provisions should be grouped with AMSA's other inspection and detention powers.

53. The legislation should adopt the provisions of the Torremolinos Convention to provide for safety regulation of fishing vessels coming within Commonwealth jurisdiction.

Table 14.1: IMPLEMENTATION OF THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS) 1974

SOLAS CONVENTION CHAPTER	SECTION/MARINE ORDER
Chapter I covers ship surveys and certificates and allows a party to inspect and control the ships of other parties when they are visiting the former party's ports.	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 31, <i>Ship Surveys and Certification</i>
Chapter II covers ship subdivision and stability Chapter II-1 specifies machinery and electrical installations Chapter II-2 specifies detailed fire protection, detection and extinction requirements.	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 12, <i>Construction – Subdivision and Stability, Machinery and Electrical Installations</i> Marine Orders Part 15, <i>Construction – Fire Protection, Fire Detection and Fire Extinction</i>
Chapter III covers standards for life-saving appliances and procedures <ul style="list-style-type: none"> • Part A covers requirements for exemptions, definitions, evaluation, testing and approval of life saving appliances and arrangements. • Part B covers particular requirements for passenger and cargo ships. • Part C covers requirements for life saving appliances including visual signals, survival craft, rescue boats, launching and embarkation and other appliances. 	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 25 <i>Equipment – Lifesaving</i>
Chapter IV covers radio telegraphy and radio telephony including facilities required, watchkeeping and listening, technical specifications and mandatory log book entries by radio operators. It also incorporates the Global Maritime Distress and Safety System (GMDSS) for distress communications and dissemination of general maritime safety information such as navigational and weather warnings.	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 27 <i>GMDSS Radio Equipment</i>
Chapter V cover safety of navigation in relation to ship-board operations and navigational services provided by parties to the Convention including meteorological services, ship routing, search and rescue services, ship crewing levels and assistance to those in distress.	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 21 <i>Navigational Equipment</i> Marine Orders Part 23 <i>Equipment – Miscellaneous and Safety Measures</i> Marine Orders Part 29 <i>Emergency Procedures and Safety of Navigation</i> Marine Orders Part 42 <i>Cargo Stowage and Securing</i>
Chapter VI covers the carriage of grain and other types of cargoes except bulk liquids, including requirements for stowing, trimming and securing grain and other cargoes to safeguard ship stability.	Sections 191, <i>Regulations to give effect to the Safety Convention</i> Marine Orders Part 33 <i>Cargo and Cargo Handling – Grain</i> Marine Orders Part 34 <i>Solid Bulk Cargoes</i>

<p>Chapter VII covers the carriage of dangerous goods including their classification, packing, marking, labelling and placarding, documentation and stowage whether in packaged form, solid form in bulk or liquid chemicals and liquefied gases in bulk.. Parties are required to issue classification instructions at the national level in accordance with the International Dangerous Goods (IMDG) Code.</p>	<p>Sections 191, <i>Regulations to give effect to the Safety Convention</i></p> <p>Marine Orders Part 17, <i>Liquefied Gas Carriers and Chemical Carriers</i></p> <p>Marine Orders Part 41 <i>Dangerous Cargoes</i></p> <p>Marine Orders Part 42 <i>Cargo Stowage and Securing</i></p>
<p>Chapter VIII covers requirements for nuclear ships</p>	<p>Sections 206U, <i>Certificates required for Australian nuclear ships</i></p> <p>Marine Orders Part 31, <i>Ship Surveys and Certification</i></p>
<p>Chapter IX covers the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code). The ISM Code requires ship operators to establish a Safety Management System (SMS) that achieves safety policy objectives in relation to safe practices for ship operation, safe working environment, safeguarding identified risks, and implementing continuous improvement in safety management skills and preparation for emergencies.</p>	<p>Sections 191, <i>Regulations to give effect to the Safety Convention</i></p> <p>Marine Orders Part 58 <i>International Safety Management Code</i></p>
<p>Chapter X covers safety measures for high speed craft.</p>	<p>Section 191, <i>Regulations to give effect to the Safety Convention</i></p> <p>Marine Orders Part 49 <i>High Speed Craft</i></p>
<p>Chapter XI covers <u>Special measures to enhance safety</u></p>	
<p>Chapter XII covers additional safety measures for bulk carriers</p>	<p>Section 191, <i>Regulations to give effect to the Safety Convention</i></p> <p>Marine Orders Part 18 <i>Bulk Carriers and Tankers</i></p>

15. CARGO

15.1 Ships' cargoes and their manner of transport present a number of hazards that require regulation:

- Different types of cargo represent particular hazards to the safety of the ship itself, both while loading/unloading or at sea;
- Some cargoes may also represent significant environmental hazards if accidentally released into the sea or port waters; and
- Equipment and facilities for handling cargoes affect the occupational health and safety of the crew.

15.2 The soundness of the ship's structure and cargo handling facilities is an important element of a ship's safety management system, as are crew competencies in handling cargo. Ships' cargo stowage facilities and equipment must be properly designed, built, maintained and operated safely. Similarly, ship operators must be made aware of the nature of cargoes consigned and any particular hazards that may arise from the cargo, so that these can be incorporated into the safe management and operation of the ship. Adequate records should be kept of cargoes to enable owners and operators to respond adequately in the event of emergencies or salvage operations.

Overloading

15.3 Overloading reduces the stability of the ship and may lead to its total loss. International rules to prevent overloading are contained in the International Convention on Load Lines 1966. The Convention is given effect in Australia by Division 5, Part IV of the *Navigation Act 1912* and Marine Order 16. A ship is not permitted to be overloaded beyond the limits allowed in the Load Line certificate, issued in accordance with the Convention, and a ship must be marked with appropriate load lines consistent with its certificate.

15.4 Division 5 also makes provision for the Australian Maritime Safety Authority to make regulations for the issue of load line certificates, grant exemptions, extend or cancel certificates, authorise survey authorities to issue certificates, issue certificates on behalf of other convention countries and request other countries to issue certificates to Australian ships. It is appropriate that these powers continue in order to provide flexibility for business in meeting the convention requirements.

15.5 Section 187C in Division 1, Part IV of the Act also defines when a ship is overloaded. It is an offence to interfere with loading marks under s191B and s192B provides for regulations to be made about stability information and tests. These provisions overlap to some extent the provisions of Division 5 and should be rationalised.

Hazardous Cargoes

15.6 Many cargoes carried by ships are hazardous to the ship, its crew, cargo handlers and the environment. These cargoes require special handling to minimise potential threats and should be readily identifiable, with relevant information made

readily available to shippers and carriers. Special measures may need to be prescribed for specific types of hazardous cargo and should be strictly enforced.

15.7 The IMO has developed international standards for a range of cargoes. Given the need for uniformity of international standards and practices to facilitate trade, these regulations should be adopted by Australia. The international standards are published in a number of codes which are readily available to shippers and the shipping industry. These include the International Maritime Dangerous Goods Code, (concerning packaged goods), solid bulk cargoes, liquid chemicals and gases and oil in bulk. Other codes address hazards to stability such as carriage of timber on deck, or grain.

15.8 The *Navigation Act 1912*, Division 10 of Part IV, requires dangerous goods to be distinctly marked and information given to the ship owner and master. Dangerous goods must not be falsely described and may be forfeited by court order. An owner or master may refuse to carry any dangerous goods and may open and inspect packages suspected of containing dangerous goods. There is a power to make regulations concerning carriage of dangerous goods and the Australian Maritime Safety Authority may prohibit certain cargoes from carriage and may detain ships with prohibited cargoes. Marine Order 41 regulates dangerous cargoes, including those defined in Chapters 17 and 18 of the International Code for the Construction and Equipment of Ships Carrying Chemicals in Bulk (IBC), the International Maritime Dangerous Goods Code (IMDG) and the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks (INF). Shipping legislation should continue to prescribe arrangements for safe handling of hazardous cargoes.

15.9 Marine Order 33 deals with handling of grain and implements the International Code for Safe Carriage of Grain in Bulk. AMSA is consulting with the grain handling industry to review MO33 with a view to removing the prescriptive requirements for loading grain and placing the responsibility for safe loading back on the grain handlers and ship operators. Marine Order 34 regulates carriage of solid bulk cargoes and applies the IMO Code of Safe Practice for Solid Bulk Cargoes and the IMDG Code.

Containers

15.10 The use of containers evolved as a means of efficiently handling and transporting a wide range of goods. The adoption of containers has significantly improved the speed of loading and unloading of ships and transport of goods to their final destinations, as well as reducing breakages and pilfering. The resulting cost savings represent a major benefit to businesses. Containers are in widespread use throughout the world and represent a substantial proportion of cargoes now carried by ships.

15.11 There is a need to have regulated standards of container construction, handling, stacking and transporting of containers for safety reasons. There is an advantage to business from having common international standards for container safety to facilitate the international transport of goods in containers. This is achieved through the International Convention for Safe Containers 1972. Division 9, Part IV of the *Navigation Act 1912* and Marine Order 44 give effect to the Convention. The

legislation should continue to provide for the convention requirements and for subsequent amendments to be conveniently implemented through Marine Orders.

Livestock

15.12 Marine Order 43 includes requirements to address the welfare needs of livestock on vessels. Animal welfare regulations are intended to ensure that livestock being transported do not suffer unnecessarily during a voyage, and are unrelated to the safety of the ship and its crew or pollution prevention. The regulations arose from a number of incidents of high losses of sheep and cattle in the live animal export trade.

15.13 These matters are also covered under the Export Control (Animal) Orders and the *Australian Meat and Livestock Industry Act 1997* (AMLI Act). It has been of concern to both the export industry and regulators that the three pieces of legislation overlap or are inconsistent. The Australian Quarantine & Inspection Service submitted that there is support for animal welfare matters to be covered by one piece of legislation.¹³¹ The shipping industry noted that some provisions of Marine Order 43 address design and construction aspects of ships carrying livestock, such as special ventilation needs, and these provisions should be retained in shipping law with other design and construction requirements.¹³²

15.14 Given the linkages between the licensing of livestock exporters under the AMLI Act, the Livestock Export Accreditation program and animal welfare, it would be more appropriate for relevant animal welfare matters to be removed from the *Navigation Act 1912* and Marine Orders, to be taken up into the AMLI Act. However, ship design and construction aspects of livestock ships should remain within shipping legislation.

Cargo Handling Equipment

15.15 The *Navigation Act 1912* provides for regulations to be made concerning the safe stowage or carriage of cargo in ships. The safety of equipment built into a ship or carried on a ship and used for loading or discharging a cargo is an integral part of the safe working of a ship. It is appropriate that regulations provide for international consistency in cargo handling and stowage to facilitate efficient international trade.

15.16 Regulations for general cargo handling equipment and cargo stowage are contained in Marine Orders 32 and 42 respectively. These regulations apply to both trading ships and offshore industry vessels and mobile units. Marine Order 32 gives effect to ILO convention requirements on marking of weights and packages (ILO27), dock work occupational health and safety (ILO152 and 160) and the ILO code of practice on safety and health in dock work. Marine Order 42 gives effect to Regulation 22 of Chapter V and part A of Chapter VI of SOLAS.

15.17 The Northern Territory Department of Transport and Works submitted that there is a conflict between Marine Orders and the Act as to whether the rules apply to all vessels, including vessels not subject to the Act, when loading or unloading at any port or place in Australia. This inconsistency can cause confusion and increased costs

¹³¹ Submission No. 27

¹³² Industry workshop Melbourne 12 April 2000

for industry.¹³³ This concern should be addressed in redrafting of the Act and the review of Marine Orders.

15.18 The regulations provide for a nominated person to be in charge of loading and unloading operations, that all equipment is properly examined and tested and personnel are properly trained and protected from injury. Before commencement of loading a shipper is required to inform a master of appropriate information on the cargo to enable precautions to be put in place for proper and safe stowage and carriage of the cargo. Cargoes must be loaded, secured and stowed so as to prevent damage or hazard to the ship and persons aboard and loss of cargo overboard, throughout the voyage. Safety of the ship includes ensuring adequate visibility from the bridge and all lookout positions, stability and access to accommodation and life saving appliances.

Recommendations

54. The legislation should continue to provide for application of relevant international conventions for cargo handling and stowage, including the International Load Lines Convention, the Containers Convention and the IMDG Code.

55. The legislation should continue to prohibit overloading of a ship and provide for inspection and detention of an overloaded ship and penalties on the owner and master.

56. AMSA should continue to have power to issue load line certificates on behalf of other countries and to authorise approved survey authorities to issue Australian certificates.

57. The overloading provisions in Division 1 should be grouped with the Load Lines provisions in Division 5 of Part IV of the *Navigation Act 1912* to assist interpretation of the legislation.

58. The legislation should continue to include the power to make regulations in respect of cargo and loading of ships consistent with the safe and environmentally responsible operation of shipping and the requirements of international conventions. This should include a power for AMSA to require a cargo operation that is deemed to be hazardous to stop until the hazardous situation is rectified or rendered safe.

59. Animal welfare matters should be removed from the Marine Orders and instead be covered by the Export Control (Animal) Orders and the *Australian Meat and Livestock Industry Act 1997*.

¹³³ Submission No. 5

16. INCIDENT INVESTIGATION

16.1 The UN Convention on the Law of the Sea provides in Article 94(7) that the flag state is obliged to hold an inquiry “before a suitably qualified person” into any incident on the high seas. Under SOLAS Chapter 1 Regulation 21, each administration also is obliged to carry out an investigation of any casualty occurring to any of its ships or within its jurisdiction. This obligation to investigate marine casualties is mirrored in all major marine conventions. Article 1(b) of the SOLAS convention requires a contracting government to promulgate laws to give full and complete effect to the Convention. The current arrangements under the *Navigation Act 1912* for incident investigation to be conducted separately from regulatory functions are considered appropriate and should be maintained.

16.2 Casualty investigations are addressed by s425(1)(ea) in Part XI of the *Navigation Act 1912*, which provides for the making of regulations in relation to the investigation of and reporting on casualties affecting ships or entailing loss of life on or from ships. The Navigation (Marine Casualty) Regulations specify in s8 that the purpose of investigations is to identify the circumstances in which an incident occurred and to determine its cause. Under s16 the Inspector must prepare a report setting out the results of the investigation and the Secretary must cause the report to be published. The aim of publication is to enhance awareness of the causes of incidents within the shipping industry.

16.3 The Regulations provide that the Inspector of Marine Accidents may investigate an incident which occurs within the jurisdiction of the *Navigation Act 1912* with the purpose of identifying the circumstances of an incident and determining its cause. The jurisdiction is defined as an incident which occurs to a ship:

- within the territorial sea of Australia or in waters to the landward side of the territorial sea; or
- if evidence relating to the incident is found in Australia; or
- to which Part II of the Act applies.

16.4 The Regulations also provide for the following matters in relation to conduct of investigations by the Inspector:

- An obligation on an owner or master of a ship to report losses of or incidents in relation to a ship;
- Appointments of officers to investigate marine incidents;
- Procedures for conducting investigations, including powers of entry to ships and premises, powers of search and to issue summonses;
- Confidentiality of records of evidence;
- Preparation of reports on incidents.

16.5 The Regulations also make provision for the appointment of Boards of Marine Inquiry to investigate incidents, with similar provisions for the conduct of inquiries.

16.6 The Inspector is independent of regulatory and administrative functions of the Australian Maritime Safety Authority to overcome any perception of conflict of interest and to create a transparent investigation process. The Inspector heads the Marine Incident Investigation Unit, which was created on 1 January 1991 as an

investigation body within the Department of Transport. It is currently located within the Australian Transport Safety Bureau (ATSB) of the Department of Transport and Regional Services.

16.7 The MIIU undertakes “no fault” investigations, in order to facilitate inquiries into the causes of incidents. It has no powers to detain vessels and the evidence given to its investigations is not permitted to be used in a criminal court.

16.8 This system resulted from tri-partite discussions among ship owners, maritime unions and the Government¹³⁴, and recognised world best practice as developed in a number of major shipping nations. The process is also seen to reduce the need for multiple investigations where a seafarer may be required to give evidence before a number of investigations, tribunals or courts. However, it does not totally remove the need for multiple investigations to achieve the separate goals of the MIIU and AMSA (or of other organisations which may be affected by an incident, such as State agencies, charter parties and P&I Clubs). The separation of incident investigation and regulation is consistent with the safety aims of the International Maritime Organization.

16.9 The same tri-partite committee also supported provisions within the regulations for the conduct of Marine Boards of Inquiry to undertake investigations in matters of considerable public interest, for example a casualty involving significant loss of life. The alternative considered was a Royal Commission, however this was judged to be less responsive and less likely to keep a focus on the cause of a marine incident. The facility of a Board of Marine Inquiry has not been used since the regulations were amended in 1990 to provide for it. All marine incidents have been investigated by the Inspector, because the occasion has not arisen requiring use of the Board powers.

16.10 The MIIU advises that the costs of its investigations are generally met within the ATSB budget and that the monetary costs to the ship owner in any investigation are minimal.¹³⁵

16.11 The shipping industry indicated that it strongly supported the concept of “no fault” incident investigations separate from safety regulation by AMSA.¹³⁶

16.12 Apart from placing an obligation on a master or owner to report an incident, the regulations do not impose upon the business of ship operations. Procedures specified in the regulations do not act to restrict competition.

16.13 Regulation for incident investigation is consistent with the objective of the Act for improving safety outcomes for the shipping industry, and is necessary for implementation of Australia’s international obligations. The benefits of the activity, in terms of enhancement of safety awareness leading to reduced likelihood of repeat occurrences, are considered to outweigh the minimal costs to businesses in

¹³⁴ Established to review the marine casualty investigation procedures following the protracted Court of Marine Inquiry into the grounding of the Australian bulk carrier *TNT Alltrans* in 1985.

¹³⁵ Submission No.2

¹³⁶ Workshop, Melbourne, 10 September 1999

cooperating with investigations and inquiries. Legislation should continue to provide for separation of incident investigation and regulatory functions.

16.14 The New South Wales Department of Transport submitted that the Navigation (Marine Casualty) Regulations should be amended to require every investigation report to contain recommendations to enhance safety and to prevent recurrence of the type of incident.¹³⁷ This would enhance safety outcomes, both directly and by placing an onus on a regulatory agency to show cause where it did not implement a recommendation and similar incidents recurred. This practice is adopted, for example, by the United States National Transportation Safety Board.

16.15 Such a proposal would be consistent with the general direction proposed for accident investigation legislation administered by the Australian Transport Safety Bureau. Little additional effort would be required to add recommendations to the MIIU incident reports.

Investigation on Behalf of Overseas Authorities

16.16 In November 1997, the IMO Assembly adopted Resolution 849(20) Code for the Investigation of Marine Casualties and Incidents. The aim of this code is to introduce a uniform systemic safety approach to marine casualty investigations and to promote cooperation between national administrations in the investigation of marine casualties. The European Union has mandated the adoption by member states of this resolution in 2001 and other countries also are examining its implementation.

16.17 The MIIU has suggested that the regulation should be amended to provide for the MIIU to make investigations on behalf of another flag State investigating under the terms of the IMO Code. The MIIU noted that it is increasingly being asked by other flag administrations to assist in safety investigations, but that for the Inspector to exercise his powers, a formal investigation must be commenced under the regulation.¹³⁸

16.18 While the MIIU could exercise powers of investigation on behalf of other Flag States by being appointed as agents of those Flag States, the time taken to gain the necessary appointments may allow the subject ship to leave Australian jurisdiction. It would not be appropriate to seek to detain a ship while these formalities are established (indeed the MIIU has no powers to detain a ship). In making an investigation, the MIIU may need to exercise various official powers, including seeking warrants and taking samples.

16.19 It is desirable that the MIIU act in accordance with official Australian procedures for entry to a vessel and taking of evidence, rather than those of another flag state. In addition, once an investigation is commenced by the MIIU, the Inspector must follow the prescribed procedures and provide a formal report, which may not always be appropriate when the MIIU is acting on behalf of another flag State.

¹³⁷ Submission No. 65

¹³⁸ Submission No. 2

Commonwealth-State Jurisdiction

16.20 The Queensland Department of Transport submitted¹³⁹ that Commonwealth regulations vest exclusive jurisdiction in the Commonwealth to investigate marine incidents other than those involving a vessel in categories covered by section 2(1)(a) to (d) of the *Navigation Act 1912*. The department is concerned that this coverage excludes a state or a state authority from investigating incidents in its own coastal waters, pilotage areas and ports, even where the Commonwealth Investigator of Marine Accidents decides not to investigate an incident. Similar concerns were raised by the Victorian Department of Infrastructure,¹⁴⁰ which also recommended consideration of the approach taken in occupational health and safety and environmental law, where investigations are conducted as potential prosecutions. Transport South Australia supported the continuing separation of incident and regulatory investigations, but called for the legislation to recognise the need for some investigations to proceed to prosecution.¹⁴¹

16.21 Advice from the Australian Government Solicitor is that constitutional limitations apply only to the extent that Commonwealth and State laws are inconsistent, and that the *Navigation Act 1912* leaves considerable scope for the application of State and Territory laws regarding incident investigation. The exception is that where the Commonwealth has actually commenced an investigation under s8 of the *Navigation (Marine Casualty) Regulations*, a State or Territory cannot investigate the same incident for the same purpose under State or Territory law.

16.22 The MIIU investigates incidents only for the purpose of establishing the cause of the incident, whereas State regulatory or port authorities (and AMSA) could also investigate with a view to establishing compliance with and/or breaches of the regulations. This occurred, for example, with the August 1999 *Lauro D'Amato* pollution incident in Sydney Harbour¹⁴², which resulted in prosecution of and fines for the vessel owner, master and chief officer under New South Wales law, as well as publication of a separate incident report by the MIIU under Commonwealth law.

16.23 Incident investigation by the MIIU does not preclude a State or Territory agency from investigating and prosecuting relevant incidents where those incidents may breach State or Territory laws.

16.24 For practical purposes, the MIIU and State agencies can conduct joint investigations, as considered necessary, under Memoranda of Understanding, with a view to minimising the burden of investigations upon ship operations, particularly delays to the ship. An example was the investigation of the *Claudia* which made contact with the jetty at Bass Point, NSW in 1998.¹⁴³ Memoranda of Understanding explicitly provide that “nothing in the memorandum will restrict the powers of either party to conduct an investigation under its legislation, whether or not the other party is

¹³⁹ Submission No.37, p5 and Submission No. 59.

¹⁴⁰ Submission No. 63

¹⁴¹ Submission No. 70

¹⁴² MIIU Report No. 149

¹⁴³ MIIU Report No. 141

also conducting an investigation into that incident.”¹⁴⁴ Where a State requests the MIIU to investigate an incident, the MIIU will do so within the limits of its available resources.

16.25 In the case of Queensland, the limitation on investigation by State authorities appears to stem from the provisions of Queensland legislation. Section 14 of the Queensland *Transport Operations (Marine Safety) Act 1994* provides that that Act does not apply to a marine incident if the incident is required to be reported under the Commonwealth Act. Section 12 of the Queensland Act provides that the Act does not apply to a ship to the extent that the Commonwealth Act applies to it. The Australian Government Solicitor concludes that the application of investigation powers by Queensland authorities where an incident is required to be reported under Commonwealth legislation (but may not in fact be investigated by the Commonwealth) is excluded by virtue of the Queensland Act, and that this exclusion is wider than is constitutionally necessary.¹⁴⁵

16.26 It is desirable that any uncertainty among State authorities on the extent of their legal and constitutional powers to investigate incidents should be resolved. The review notes that Victoria sponsored a workshop of marine incident investigators at the end of May 2000, and all States have agreed to examine their legal positions on this issue. The review considers that this is an appropriate forum for the various parties to air their concerns and to examine each jurisdiction’s legislative basis for investigations.

Recommendations

60. The legislation should continue to provide for investigation of marine casualties and incidents separately from regulatory safety functions.
61. The Navigation (Marine Casualty) Regulations should be amended to require every incident investigation report to contain recommendations aimed at enhancing safety and preventing recurrence of the same type of incident.
62. The Navigation (Marine Casualty) Regulations could be amended to allow the Inspector of Marine Accidents to investigate incidents on behalf of other Flag States, consistent with IMO Resolution 849(20).
63. The Marine Incident Investigation Unit should continue to consult with the States and Northern Territory marine accident investigation authorities to ensure that Commonwealth and State/Territory legislation provides for appropriate coverage of marine incident investigations by each jurisdiction.

¹⁴⁴ For example, Memorandum of Understanding between Marine Board of Victoria and Marine Incident Investigation Unit in Relation to Investigation of Marine Incidents, March 1998, clause 4.

¹⁴⁵ Australian Government Solicitor, correspondence with MIIU, 27 January 1998

17. WRECK REMOVAL

17.1 AMSA has powers under s314A of the *Navigation Act 1912* to order an owner to remove any ship or part of a ship wrecked on or near the Australian coast, within a specified period of time. If the owner does not do so, AMSA may then cause the wreck to be removed or destroyed and may recover expenses from the owner. AMSA may also sell a wreck and pay the proceeds, less expenses, to the owner.

17.2 These provisions give effect to the objective of prompt removal of hazards to navigation and possible environmental damage. The aim is to limit the potential for further damage or losses due to collision with the wreck as well as losses consequential to any need to deviate around a wreck or denial of maritime facilities due to the location and hazardous nature of a wreck. These aspects of wreck bear directly on the efficient functioning of the maritime industry and may also affect other industries such as fishing and tourism. The law should provide for quick removal of a wreck in these circumstances.

17.3 It is appropriate that responsibility for removal of a wreck should rest with the owner, and that an owner cannot escape liability by abandoning the wreck. If an owner cannot or will not fulfil this responsibility, provision for public authorities to do so is required.

17.4 While State and Territory laws generally make similar provisions for wreck removal, particularly in harbour areas, it is desirable that the *Navigation Act 1912* also provide for wreck removal to cover circumstances where state laws can not apply. It would be appropriate that AMSA's powers to order wreck removal be capable of application throughout all the waters claimed by Australia, and not be limited to wrecks "on or near the coast".

17.5 The Act treats wreck removal in two different ways. The power to remove or order removal of historic wreck is constrained to circumstances involving saving of human life, securing safe navigation of ships and dealing with an emergency involving a serious threat to the environment. This applies to wrecks declared as historic shipwrecks under both the Commonwealth *Historic Shipwrecks Act 1976* and equivalent State or Territory laws. It is appropriate that AMSA retain the power to order removal of hazardous historic wrecks, but that the circumstances should be strictly limited to those specified.

17.6 For non-historic wrecks, there is no limitation on the circumstances in which AMSA can deal with wreck removal. AMSA in practice limits orders to remove a wreck to those circumstances specified for historic wreck, ie saving life, securing safe navigation of ships, and dealing with a serious threat to the environment. It would be in the industry's interests and AMSA's interests to have its wreck removal powers formally narrowed to align with the Act's core function of safety and environmental protection. Removal costs can be significant and may easily outweigh any public benefit of removal where there is no significant threat to safety or the environment.

17.7 As the power to order removal of a wreck is related to the safety and environmental protection objective, the power should be retained but it should be regrouped with other safety related matters.

Additional Matters

17.8 Wreck removal is not specifically covered by international conventions at present, nor does UNCLOS specifically refer to wrecks, and it is unlikely that a convention will be adopted in the near future.¹⁴⁶ The IMO, however, is considering a proposed convention to enhance uniformity in international law, fill the existing gap in international law and achieve consistency with coastal states' powers under UNCLOS.

17.9 The draft convention is considering a suggestion that cargo interests be required to contribute to the costs of removal of a hazardous wreck where cargo alone may be decisive in the wreck being declared as a hazard. There is some argument that a requirement for cargo interests to contribute to the costs of removing hazardous wreck would encourage cargo owners to carefully select the standard of ships they contract to transport cargo to ensure that they are safe. This position is consistent with the "polluter pays" principle and liability for cargo interests also has precedent in the HNS Convention. To date, however, this argument has not received general acceptance.

17.10 Adoption of such a measure in national law in advance of any convention agreement on the matter is not appropriate. If Australia adopted such a provision before other nations, it could affect the competitiveness of our international trade where other exporters or importers would not be required to pay insurance or carry the risk of removal costs. It would be preferable to await the outcome of international deliberations before introducing this requirement into national law.

17.11 The draft convention also canvasses reporting requirements so that an appropriate authority is notified of the extent and nature of the wreck and may identify any particular hazard associated with it or its cargo. The Act does not specifically require the notification of wreck location or marking of a wreck site where the wreck may pose a hazard to navigation or the environment. Sections 268 and 269 require a master or owner of a lost ship to report the loss. Section 269A imposes an obligation on a master to report encounters with a serious danger to navigation. A serious danger is defined to include a dangerous derelict vessel, but not other forms of hazard caused by wreck. Section 302 requires any person finding a wreck to give notice to the receiver of wreck, although this requirement appears to be more related to the purpose of securing lost property and returning it to its owner.

17.12 It would be appropriate for an owner or finder of a wreck to be required to report its location to the Australian Maritime Safety Authority, so that any hazard can be assessed and marked, and for the owner to be liable for costs of marking the wreck if it is not removed.

17.13 Heritage South Australia submitted that the legislation should require AMSA to notify the relevant State, Territory or Commonwealth Minister responsible for historic shipwreck of any intention to order or undertake removal of a wreck. It was concerned that AMSA could remove or destroy a wreck without any assessment being

¹⁴⁶ The International Convention on the Limitation of Liability for Maritime Claims 1976 provides *inter alia* for limitation of costs of removing a wreck or its cargo. Australian legislation giving effect to the Convention, the *Limitation of Liability for Maritime Claims Act 1989*, however, does not give effect to the wreck removal provisions in Article 2 of the Convention.

done of its historical value. Prior notification could enable site recording and possible salvage archaeology to take place. Heritage SA also proposed that the legislation should not empower AMSA to sell items from an historic shipwreck to recover its costs, noting that the Historic Shipwrecks legislation was introduced, in part, to prevent the Commonwealth Receiver of Wrecks from selling historic wreck.¹⁴⁷

17.14 The review is proposing that AMSA's powers to order removal and to remove wreck itself should be exercised in limited circumstances where there is a clear hazard to life, navigation or the environment. These circumstances would generally require a prompt response to remove a serious hazard. It would not serve the public interest for such hazards to be allowed to continue while archaeological investigations are undertaken. The *Navigation Act 1912* specifically provides for AMSA to take action to remove historic shipwreck despite anything in the *Historic Shipwrecks Act 1976*, where it is necessary for safety or environment protection. The *Navigation Act 1912* currently does not require AMSA to report to heritage authorities before taking action to remove wreck, and the review considers it would not be appropriate to constrain its actions aimed at eliminating serious risks to safety and the environment. The limited likelihood of loss to the community of archaeological values is likely to be outweighed by the benefits from enhanced safety and environmental protection.

17.15 As the costs of wreck removal can be significant, the review considers it would be appropriate for AMSA to be able to recover its costs as currently provided for in the legislation. The final disposition of items of significant heritage value from ordinary wreck should be handled in consultation with heritage authorities, where the owner cannot be found, and it may be appropriate for the relevant heritage authorities to reimburse AMSA for the costs of recovery and removal of such items. Where a wreck already is declared as historic under Commonwealth, State or Territory laws, sections 314A(3) and (4) of the *Navigation Act 1912* provide that AMSA may not exercise any of its wreck removal powers unless it is necessary for safety or environment protection purposes. The power to sell recovered historic wreck could not be considered to be necessary to safety and environment protection and would appear already to be excluded by the provisions of the Act.

¹⁴⁷ Submission No. 73

Recommendations

64. The legislation should continue to provide for AMSA to have the powers to order removal of both historic and ordinary wreck in Australian waters or to undertake removal itself.
65. AMSA's power to order or undertake removal of both ordinary and historic wreck should be limited to promotion of the legislation's safety and environmental protection purpose.
66. The legislation should continue to place responsibility for costs of removal on the owner of the wreck. Where the owner cannot be identified or is unable or unwilling to remove the wreck, AMSA should be empowered to sell the wreck to recover its expenses, as well as having the right to pursue the owner for any outstanding amount. Alternatively there should be provision for any surplus from sale of removed wreck to be paid to the owner and for the Commonwealth to appropriate the funds if the owner cannot be found.
67. An owner or person finding a wreck should be required to report its location and any potential hazards to AMSA.
68. The owner should be responsible for costs of marking a hazardous wreck if it is not removed.
69. Wreck removal provisions should be regrouped with other safety related matters in the restructured Act.

18. OFFSHORE INDUSTRY VESSELS

18.1 The offshore petroleum industry in Australia is regulated under both the *Petroleum (Submerged Lands) Act 1967* (PSLA) and the *Navigation Act 1912*. Part VB of the *Navigation Act 1912* provides for regulations to be made concerning the operations of offshore industry vessels and mobile units. Specific provisions for offshore industry mobile units are contained in Marine Orders Part 47. New provisions have been developed for Floating Offshore Facilities under Marine Orders Part 60. AMSA also has developed the Offshore Support Vessel Code of Safe Working Practice (OSV Code) in consultation with the Department of Industry, Science and Resources (DISR) and the industry.

18.2 A principal purpose of both the PSLA and the *Navigation Act 1912* is to ensure safety of life and property and protection of the marine environment for vessels, including those operating in the offshore petroleum industry. Given the international competitiveness of the industry and that many vessels operating in the industry within Australian waters are foreign-flagged, it is necessary to pursue the safety and environmental objective within the framework of international law and agreements for ship safety and marine environmental protection.

Jurisdiction

18.3 Concerns have been raised about the coverage of installations and support vessels by both the *Navigation Act 1912* and the PSLA. Industry submissions have indicated to the *Navigation Act 1912* review that there are uncertainties over which act applies to a particular vessel at any given time and concerns regarding unnecessary compliance costs associated with the two regimes.¹⁴⁸ Moreover, there is uncertainty about the application of the *Navigation Act 1912* to foreign flagged vessels which do not enter an Australian port. The report of the Offshore Petroleum Safety Case Independent Review Team also notes that Australia's legal and administrative framework is complicated by the interaction of Commonwealth and State legislation, including the *Navigation Act 1912*.¹⁴⁹

18.4 The PSLA regulates the offshore oil and gas industry, including petroleum installations and the operation of ships within a 500 metres exclusion zone around an installation. The *Navigation Act 1912* also applies to offshore mobile units and offshore industry vessels. In accordance with the Offshore Constitutional Settlement, the *Navigation Act 1912* provides that the PSLA takes precedence to the extent of any inconsistency between the two Acts.

18.5 There is a range of different types of vessels operating in the offshore industry, which have different operational characteristics and may require different forms of regulation from ordinary trading ships.

18.6 The self-propelled Floating Production, Storage and Offloading (FPSO) facilities are classed by the International Maritime Organization (IMO) as seagoing ships, which are required to comply with the relevant maritime conventions. Australia applies the international maritime safety rules to these facilities under the

¹⁴⁸ Submission Nos 7, 36, 38, 40 and industry workshop, Perth 20 September 1999

¹⁴⁹ Finnestad, Ognedal and Spence (2000)

Navigation Act 1912 when they are operating as vessels, that is when they are disconnected from the seabed riser. Other developed countries such as the US, Canada, NZ, Netherlands and Singapore also apply IMO regulations to these vessels. When the FPSO is connected to the seabed riser, it is treated as a petroleum installation and must comply with the PSLA.

18.7 While an FPSO is operating as a ship, it presents the same risks to the environment and safety as other ships.¹⁵⁰ Appropriate regulation of vessel standards and crew size and competencies, consistent with international maritime conventions for the safety of life at sea and protection of the marine environment, are required. The offshore industry acknowledged that an FPSO in non-operational mode and undertaking a voyage at sea should fall completely under the jurisdiction of the *Navigation Act 1912*.¹⁵¹ However, the peak industry body, the Australian Petroleum Production and Exploration Association (APPEA) argues that an FPSO undertaking a “temporary” disconnect during operations should not be categorised as a ship and should not come under the *Navigation Act 1912*. This issue is dealt with in the next section.

18.8 Shuttle tankers taking petroleum products from offshore installations are subject to all the relevant IMO requirements for conventional tankers. When a tanker interacts with an installation within the 500 metres exclusion zone, it is required to be operated in accordance with the safety case regime operating under the PSLA. However, the Attorney-General’s Department advised that the *Navigation Act 1912* does not apply to foreign ships that use Australian sea installations, and for this to occur the definition of a port in the Act would need to be amended to include an Australian installation.¹⁵² The replacement to the *Navigation Act 1912* should include offshore installations in the definition of a port.

18.9 The purpose built offshore industry support vessels which carry supplies and equipment and provide other services, such as firefighting or diving, are covered by the *Navigation Act 1912*, where applicable. They are also required to operate under the offshore operator’s safety case regime under the PSLA when interacting with an installation within the 500 metres exclusion zone.

18.10 Some seismic vessels and drilling platforms are regulated under the *Navigation Act 1912*, where applicable, although some foreign ships are effectively unregulated (see below). Although these vessels do not operate in conjunction with a petroleum installation, the PSLA also may also regulate them under a Schedule of specific requirements for offshore petroleum exploration and production in waters under Commonwealth jurisdiction.

¹⁵⁰ Environmental risks and costs to the general community may even be greater than for ordinary trading ships. Recently the International Oil Pollution Compensation Fund considered whether FPSOs may not be eligible for compensation payments from the Fund under international convention rules in some circumstances, ie where an FPSO that has disconnected from a riser to escape severe weather or to proceed to port for repairs or survey is involved in a pollution incident. A Fund working party concluded that the 1992 convention should apply to FPSOs only when they carry oil as cargo on a voyage to or from a port or terminal outside the oilfield in which they normally operate. This issue is still under consideration by the Fund.

¹⁵¹ Submission No. 70, p9

¹⁵² Submission No. 44

18.11 Non-FPSO vessels clearly operate as ships and should be subject to the relevant environment protection and safety provisions of the *Navigation Act 1912*. It may be necessary for them to also comply with the specific measures relating to an offshore installation and its particular hazards when the vessel is in close proximity to the installation. Accordingly these vessels should also continue to be subject to the PSLA as necessary.

18.12 Unregulated ships present a particular issue for safety regulation in the offshore industry. There is a specific problem with lack of regulatory coverage of some seismic ships, which have been involved in a number of ship safety incidents in Australian waters. These are foreign flagged ships, usually engaged in seismic survey work in the offshore industry, that fall outside the tonnage limits for application of international maritime conventions. The relevant flag State also does not regulate these non-convention ships. Consequently, Australia's ability to apply Port State Control inspection to the vessels appears to be constrained in relation to ensuring their compliance with international conventions and Australia's own rules for non-convention ships, the Uniform Shipping Laws Code. Australia should pursue international agreements to apply appropriate controls to such ships operating within Australia's jurisdiction.

18.13 An alternative approach in the meantime would be for DISR to consider the potential for the *Petroleum Submerged Lands Act 1967* licensing arrangements for offshore operators (ss33, 38H or 56) to be used to impose a condition that requires all vessels operated or contracted by them to comply with the spirit of international maritime conventions regardless of their tonnage. This should be recognised as a mandatory component of the licensed operator's safety case, regardless of the SOLAS convention's tonnage limit and whether such vessels are operated directly or on a contracted basis.

18.14 DISR, however, has a strong preference for unregulated vessels to be brought under the *Navigation Act 1912*, and suggests Australia should pursue appropriate amendments to international agreements to obtain the necessary authority. DISR considers that the alternative option using the PSLA is the least favoured option, as it may not be capable of achieving the desired objective. Conditions are not placed on PSLA titles retrospectively, so any solution delivered under the PSLA would be ineffective for a large number of existing titles.¹⁵³ While this alternative approach would not necessarily capture all currently unregulated seismic ships, however, the review considers that Australia should take all possible steps to close the regulatory gap to the maximum extent possible.

Regulatory Approaches

18.15 Although sharing a similar objective, the two Acts currently apply different philosophies towards safety and environmental regulation. The possible conflict or duplication of regulations and uncertainties in administration have been cited by industry as a possible restriction on the competitiveness of Australian operations.

18.16 The *Navigation Act 1912* is currently prescriptive and places the onus on the ship's master to follow the detailed requirements of the Act and the subordinate

¹⁵³ Submission No. 64

Marine Orders. The Act and Orders are being reviewed and it is proposed that in time they will move towards a performance based approach, while still being consistent with IMO obligations. NOGSAC endorsed this proposed shift in emphasis, and recommended that the new *Navigation Act 1912* should focus on the risks associated with vessel operations and include a requirement for employers to consult with employees in assessment of safety matters.¹⁵⁴

18.17 The PSLA operates under a safety case approach for the total operation. Under this approach, the onus is on the operator to identify the major risks and hazards and to develop appropriate responses.

18.18 APPEA submitted, on behalf of a number of offshore industry operators, that this difference in regulatory approach imposes unnecessary duplication and compliance costs on the industry, amounting to “several tens of thousands of dollars per year per facility”. APPEA sought amendments to the PSLA and *Navigation Act 1912* to establish primacy of the PSLA for the regulation and administration of FPSOs in operating mode, including “temporary” disconnects from the seabed riser. This would require that FPSO facilities in operational mode are subject only to the PSLA and are answerable administratively to the petroleum authorities under that legislation for all aspects of the operations, including the maritime component, using the demonstrated Safety Case regime. APPEA also argued that much of the IMO conventions applied to FPSOs derives from regulations designed for trading ship operations, and does not meet the offshore industry’s need for facility specific regulations. As a result many concessions and interpretative dispensations have been necessary in order to achieve workable arrangements at the interface of the PSLA and the *Navigation Act 1912*.¹⁵⁵

18.19 This view was not shared by all engaged in the offshore industry. For example, P&O Maritime Services submitted that all vessels engaged in the industry, other than FPSOs when actually connected to the riser, do operate as ships and as such should at all times remain under the jurisdiction of the *Navigation Act 1912*. P&O considered that the *Navigation Act 1912* should accordingly take priority over the PSLA.¹⁵⁶

18.20 It is recognised that some aspects of the IMO conventions applied to FPSOs may not fully reflect the different operational requirements and characteristics of these vessels against ordinary tankers. For example, APPEA claimed around \$30 million over 10 years is added to the cost of operating FPSOs due to dry docking requirements under IMO regulations.¹⁵⁷ Industry also pointed to requirements to free-fall test life boats at sea, which could lead to loss of lifeboats from FPSOs.¹⁵⁸

18.21 However, as long as the IMO continues to require FPSOs to be treated this way, Australia should apply consistent regulations. This would be consistent with the practice in other countries responsible for FPSO operations. Provisions for FPSO operations can continue to be managed by sensible application of the equivalence and exemption provisions under the conventions and Marine Orders. In the longer term,

¹⁵⁴ Submission No. 40

¹⁵⁵ Submission No.70

¹⁵⁶ Submission No. 52

¹⁵⁷ Submission No. 36

¹⁵⁸ Finnestad, Ognedal and Spence (2000)

there would be benefit in the industry joining with AMSA to establish international support for development of a separate chapter of SOLAS for FPSOs that better reflects their operational circumstances.

18.22 With regard to the proposal for a single authority to regulate all aspects of the operations of FPSOs under a safety case regime, the review notes the findings of the Independent Review Team for the Australian Offshore Petroleum Safety Case Review.¹⁵⁹ That review found that the regulatory system in Australia requires substantial improvement, as the day to day regulation of health, safety and the environment in Australia's offshore petroleum industry is complicated and insufficient to ensure appropriate, effective and cost efficient regulation of the industry. The review also found that, while a single authority would be the best possible solution, the mix of Designated Authorities responsible for management of the safety case regime do not currently have sufficient skills or resources to adequately fulfil this role.

18.23 In these circumstances, the *Navigation Act 1912* review team does not consider it prudent to add responsibility for maritime regulation to the existing functions of the petroleum regulator's Designated Authorities at this time. This is an area requiring specialised skills and it would be more appropriate for the assessment of relevant standards and competencies for maritime operations to be conducted by a body competent in maritime matters, such as AMSA, under maritime legislation. The review understands that DISR shares this view and that it would not wish to accept full responsibility for maritime aspects of FPSO operations when disconnected from the riser at this time.¹⁶⁰

18.24 Nevertheless, the review accepts that there are some avenues for improving the regulation of the offshore industry, particularly of FPSO operations. The review supports continuing joint review of the offshore industry legislation with DISR, the States/Northern Territory's Designated Authorities and the industry.

18.25 The proposed adoption of a performance based approach by the revised *Navigation Act 1912* should provide a means of better integration of ship safety regulation at the interface with the PSLA.

18.26 As well, better coordination of the audit and compliance functions of both regulatory systems would help to reduce or eliminate duplication of compliance costs for industry. AMSA and DISR are working with industry to develop consistent codes of practice and technical assessment that meet the requirements of both the *Navigation Act 1912* and the *Petroleum (Submerged Lands) Act 1967*.

18.27 Further reductions in compliance costs could be made if safety arrangements provided for integration and mutual recognition of the IMO International Safety Management Code (ISM Code) requirements for maritime operations as part of the PSLA safety case. An offshore vessel's compliance with the ISM code could be formally recognised as satisfying the maritime operations part of the safety case regime as the minimum standard under the PSLA. P&O Maritime Services supported

¹⁵⁹ Finnestad, Ognedal and Spence (2000)

¹⁶⁰ Communications with DISR, 22 May 2000

this concept,¹⁶¹ although NOGSAC expressed some reservations about the quality of ISM certification and preferred the reverse arrangement whereby the FPSO safety case is accepted as the over-riding document.¹⁶²

18.28 Where an operator can demonstrate that relevant matters have been covered under the safety case for an FPSO, Marine Orders Part 60 already provides for exemptions to be granted from the requirement to have Certificates of Compliance under the Marine Order. The *Navigation Act 1912* also makes provision for exemptions from all or part of the Act for offshore industry vessels or mobile units, as specific circumstances warrant.

Other Operational Issues

18.29 Some industry representatives expressed concern to the *Navigation Act 1912* review about the costs of maintaining a marine crew aboard an FPSO when it is connected to a riser.¹⁶³ This was considered an unnecessary expense due to the requirements of the *Navigation Act 1912*. When an FSPO is operating as a ship it must meet the minimum safe manning requirements for shipping operations under the *Navigation Act 1912*. It is recognised that an FSPO may only operate in this manner a small percentage of its time.

18.30 While the *Navigation Act 1912* provides for safety manning of a ship at sea, however, it does not require marine crews to remain on board an FSPO when it is attached to the riser and not operating as a ship. The maintenance of a marine crew aboard an FSPO when not functioning as a ship, or arrangements for stand-by crews in emergencies, is a matter for the offshore operator to determine. This assessment should be subject to the risk assessment procedures of the PSLA safety case requirements and acceptance of this risk assessment by the Designated Authorities.¹⁶⁴ There is nothing in the Act or Marine Orders, for example, that would prevent a company from multiskilling its workforce.

18.31 Support ships' crews may not always be fully conversant with or have access to the installation's safety case regime under the PSLA.¹⁶⁵ It is suggested that better integration of support vessels and involvement of their crews in developing the installation's safety case may address any confusion and lead to better understanding of procedures and plans, particularly in cases of emergency. This aspect of facility operation should be improved with the adoption of company based employment and a greater commitment by companies to integrate support ships' crews into safety case development and training.

¹⁶¹ Submission No. 52

¹⁶² Submission No. 40

¹⁶³ Industry workshop, Perth 20 September 1999

¹⁶⁴ Operational considerations may include, for example, the feasibility of transferring a marine crew aboard during an imminent cyclone, when bad weather may preclude airlifting personnel aboard.

¹⁶⁵ Consultations with NOGSAC, Melbourne 28-29 October 1999

Recommendations

70. The revised *Navigation Act 1912* should continue to apply to ships in the offshore petroleum industry, including FPSOs when operating as ships, but there should be improved integration with the regulatory system under the *Petroleum (Submerged Lands) Act 1967* when coverage coincides with the *Navigation Act 1912*.

71. The Department of Transport and Regional Services and AMSA should continue to work with the Department of Industry, Science and Resources and the offshore industry to review and streamline the legal and administrative arrangements for safety management in the offshore sector. There should be better coordination between the audit and compliance functions of both regulatory systems to reduce or eliminate duplication of compliance costs.

72. The Department of Industry, Science and Resources should recognise an offshore vessel's compliance with the ISM code as part of the safety case under the *Petroleum (Submerged Lands) Act 1967*.

73. The Department of Industry, Science and Resources should ensure better integration of support craft into offshore petroleum installations' safety case, particularly involving crews on offshore support vessels in development of the safety case.

74. The offshore industry should join with AMSA in promoting within the IMO adoption of a regulatory regime for FPSO's which is more compatible with their shipping requirements.

75. Unregulated ships in the offshore petroleum industry should be brought under the revised *Navigation Act 1912* wherever possible.

- (a) The Department of Transport and Regional Services should explore with the Attorney General's Department additional legal means for bringing unregulated ships in the offshore industry under the revised *Navigation Act 1912*.
- (b) Australia should also pursue appropriate amendments to international agreements to obtain the necessary authority to appropriately regulate such vessels which are operating in Australian waters.
- (c) Additionally, the Department of Industry, Science and Resources should examine making a condition of an offshore operator's licence under the *Petroleum (Submerged Lands) Act 1967* that vessels contracted by a licensee should comply with the ISM Code regardless of their tonnage. AMSA should be responsible for auditing compliance with the ISM Code.

CREW CONDITIONS

19. AUSTRALIAN CREWS

19.1 Part II of the *Navigation Act 1912* addresses a range of matters related to the employment of seafarers on Australian ships. These provisions largely derive from 19th century British shipping laws, and were designed to protect seafarers from exploitation by unscrupulous ship operators and masters. The 19th century seafarer led a life of danger, brutality, privation and in many cases squalor. Government intervention was considered necessary to protect the interests of often uneducated seafarers who were employed on a casual basis for a specific voyage. An employer's responsibilities towards the seafarer ended at the conclusion of each voyage, and the seafarer had to sign up anew for the next voyage, perhaps on a different ship or under a different owner or master. Ships' masters then had wide authority over the lives of seafarers, and voyages often lasted several months or years with limited opportunities for communication with families.

19.2 Since then there have been many improvements in the standards of ships and amenities on board, as well as improved communications and social and industrial support services for Australian seafarers. A number of the provisions of Part II are no longer relevant. With the introduction of company based employment in 1998, it was no longer considered necessary for Government authorities to intervene in the engagement, discipline and payment of seafarers. These matters are considered to be matters for negotiation between employers and employees or their representatives. Relevant aspects of Part II were therefore proposed for repeal under the Navigation Amendment (Employment of Seafarers) Bill 1998. Matters covered by the Bill are excluded from this review.

19.3 Part II of the Act regulates several additional aspects of seafarer employment that relate to the safe operation of a ship and the health and safety of the crew. These include qualifications, minimum safe manning levels, medical fitness, and other factors that may affect fitness for duty such as provisions, medical supplies and accommodation. These matters are discussed under the safety chapters. The following sections examine remaining matters in Part II that do not relate to the safety of the ship and seafarers.

19.4 A guiding principle for the review is that seafarer employment matters should be aligned or incorporated into general labour law as far as possible. Employers and employees should be encouraged to negotiate employment conditions as much as possible in response to individual business conditions.

19.5 However, it is also recognised that some conditions for seafarers should remain in shipping law where they are still considered necessary to address particular aspects of seafaring. Seafarers are required to live and work in the same environment, they must abide by safety regulations around the clock and their workplace (and residence) moves from place to place, including internationally, over what may be a lengthy period. Legislative provision for seafarer conditions is standard international practice found in shipping law across both traditional and newly established shipping nations. Industrial legislation generally assumes the need for some form of regulation in the employer/employee relationship, and provision for a small number of specific

occupational regulations in shipping law reflects those characteristics of shipping that cannot be covered under general employment legislation.

19.6 The shipping and offshore industries overwhelmingly supported the concept that industrial matters should be covered as far as possible under industrial relations legislation, with relevant provisions of the *Navigation Act 1912* being repealed. They recognised, however, that some matters specific to the shipping industry should remain in shipping legislation.¹⁶⁶

19.7 The Maritime Union of Australia generally accepted that terms and conditions of employment for Australian seafarers could be set and protected by agreement with employers, although it has reservations about the effectiveness of the *Workplace Relations Act 1996*. The MUA however, noted that key areas of competencies, conduct, accommodation, repatriation and other related matters should be properly regulated in an Act specifically applying to shipping.¹⁶⁷ The union noted that there is a uniqueness in the shipping industry that is supported by the establishment of separate and distinct international conventions which should be incorporated into shipping legislation. The union proposed that the concept of seaworthiness should acknowledge that a ship is a society and not merely a means of transport.¹⁶⁸

19.8 The review has recognised that some unique characteristics apply to the shipping industry and has supported retention of regulation based on international conventions for matters such as competency and accommodation as safety matters (see Chapters 11 and 14). The review recommends retention of regulation of other matters unique to shipping, including the employer's duty to repatriate a seafarer (see below).

Superintendents

19.9 Section 13 of the Act provides for the Australian Maritime Safety Authority to appoint a person to be a superintendent. A superintendent has a number of functions under Part II as an independent "referee" or investigator of disputes between a master and the crew of a ship. The superintendent is also responsible for receiving the effects of deceased seafarers and various documents from the master when a ship arrives in an Australia port. A superintendent also has powers to detain a ship where permitted under the Act. In practice AMSA appoints its inspectors as superintendents.

19.10 The majority of prescribed functions of a superintendent were proposed for repeal under the Navigation Amendment (Employment of Seafarers) Bill 1998. Additional matters related to disputes in employment matters between a crew and the master also are suggested for repeal by this review (see below). In light of the reduction in these functions, the appointment in writing to a specific office is unnecessary. References to the superintendent should be repealed and remaining statutory functions should be performed by reference to the Australian Maritime Safety Authority.

¹⁶⁶ Submission Nos. 7, 13, 16, 17, 23, 35, 38 and industry workshops Melbourne 10 September 1999, Sydney 22 September 1999, Perth 20 September 1999

¹⁶⁷ Submission No. 31

¹⁶⁸ Submission No. 74

Agreements

19.11 The Navigation Amendment (Employment of Seafarers) Bill 1998 proposed amendments to the requirement for articles of agreement in s46 of the *Navigation Act 1912*, to be replaced by a requirement only that a ship shall not be taken to sea unless there is an agreement in force between a master and the crew. Prescriptive requirements for the form of agreement were proposed to be repealed and the definition of an agreement expanded to include any type of agreement provided for under the *Workplace Relations Act 1996*.

19.12 General employment law does not require that all employees must be covered by some form of formal employment agreement. While the *Workplace Relations Act 1996* upholds the principle of choice for employers and employees to choose the industrial instrument provided under the Act which best suits the individual enterprise's needs, informal agreements or contracts made outside the Act continue to remain an option. Agreements or contracts made outside the Act also fall outside its scope of regulation.

19.13 However, the shipping industry indicated in consultations that it was in favour of retaining a mandatory requirement for an agreement to be in place.¹⁶⁹ This is because a ship is a more isolated workplace than most other workplaces, and access to external references or representatives for settling disputes is difficult. It is important that both the master, as the employer's representative, and the crew have, as far as possible, the means on hand to forestall and/or settle disputes about working conditions and entitlements.

19.14 For a ship voyaging overseas, it is an accepted requirement in international law that ships carry adequate documentation of employment agreements as an easy means for overseas authorities to check on employment conditions of the crew against the laws of the flag state. Port states may check agreement conditions to establish whether the crew of a ship entering their country is likely to become a welfare burden on the port state as a consequence of poor on-board conditions. Ships may also be subject to industrial action overseas if adequate documentation of employment conditions is not held aboard. Where adequate information is not held on the ship, considerable delays can occur in the ordinary operation of border functions and the loading or unloading of cargo, resulting in higher costs through lost time.

19.15 It is sensible practice that Australian shipping law should continue to prohibit a ship from sailing unless the master and crew are covered by a formal employment agreement. This is a convention –based requirement adopted by all shipping nations and is consistent with the principle of facilitating international trade by maintaining shipping laws consistent with mainstream international practice. There would be no difference in treatment between Australian and foreign registered ships, and to continue this requirement would not disadvantage the shipping industry.

19.16 The Maritime Union of Australia indicated it does not support the use of the articles of agreement system as a form of de facto award system, and is not opposed to current collective agreements negotiated under the *Workplace Relations Act 1996*. However, it expressed concern that the proposed broadening of the definition of

¹⁶⁹ Industry workshop Melbourne 12 April 2000

agreements in s46 may enable unscrupulous employers to undermine standardised procedures for recording competencies and skills of seafarers, which underpin the system of seafarer certification. This was proposed as a safety issue related to competencies of seafarers under flag of convenience operations.¹⁷⁰

19.17 The review considers it is appropriate that s46 be amended to provide for a broader range of agreements concerning employment arrangements. Such agreements should relate only to the employment conditions for seafarers employed by the ship operator, and are not necessary for the proper administration and assessment of Australian seafarer competencies. AMSA does not currently use articles of agreement as proof of sea service when certifying seafarers. While articles were available to Examiners of Seamen as a supplementary form of evidence many years ago, the articles were primarily submitted to AMSA's predecessor as a central body for keeping track of seafarers' sea time for the purpose of determining long service and superannuation entitlements. This function was performed by the government on behalf of industry, on a fee for service basis, in recognition of the casual and pooled nature of employment in the industry. The function ceased to be carried out by a government agency around 1988, when it became a direct industry responsibility.¹⁷¹

19.18 For crews on Australian ships, AMSA requires the individual seafarer to produce evidence of sea time for certification and competency purposes. This would usually be in the form of a statement of service issued to the seafarer at the end of a voyage. AMSA may ask for confirmation and additional details to be provided by the employer. With company employment arrangements, an employer can provide a statement of service over a period of time and a number of vessels. This would be the equivalent of a statement issued at the end of each voyage. The safety objective of the Act can be achieved by a requirement in the Act for employers to provide a true statement of service at sea. This should be kept separate from requirements in s46 for proof of an employment agreement to be kept on board.

19.19 An additional function of articles of agreement was to provide a consolidated list of persons on board. There is a public policy benefit in requiring evidence of persons on board for border control purposes and for search and rescue. However, there is no need for this requirement to be fulfilled through a prescribed form of employment agreement. It would be better met by a distinct obligation for the employer and/or master to maintain a current record of persons aboard, either in the Official Log or through some other reporting arrangement.

19.20 It should be noted that s46 relates only to seafarers on Australian ships, and that AMSA's powers to assess seafarer certification and competency aboard foreign ships under the Port State Control regime is not affected by any changes to s46.

19.21 Section 83(1)(d) prevents any agreement that prevails upon a seaman to give up his rights to salvage and s140 prohibits the assignment of salvage rights of a seafarer before it accrues (see Chapter 23). These provisions presuppose that a seafarer does not have sufficient information on his salvage rights or negotiating strength to be able to adequately bargain for his entitlements. In the modern era, with

¹⁷⁰ Supplementary Submission by the MUA to the Inquiry into the Navigation Amendment (Employment of Seafarers) Bill 1998, included in Submission No.74

¹⁷¹ Communications with AMSA, 30 May 2000

an educated workforce under company-based employment arrangements, there is no compelling reason why employers and employees should not be able to bargain around salvage rights in company employment agreements. These sections should be repealed.

19.22 Section 148 provides for any party to a contract affecting the relationship between a master or owner and a seaman to institute proceedings to rescind the contract and for a Court to rescind a contract on such terms as the Court deems just. The purpose of this provision was to enable parties to revoke an unfair or unreasonable agreement they may have entered into. Under direct company employment arrangements, agreements most likely would be made and registered under the *Workplace Relations Act 1996*. That Act provides for agreements to be negotiated between parties, which then have to be certified as passing the “no disadvantage” test of the Act. Once an agreement has been certified it is binding on the parties for the life of the agreement.¹⁷² A provision in the *Navigation Act 1912* for either party to apply to rescind a contract would be inconsistent with the *Workplace Relations Act 1996*,¹⁷³ and s148 should be repealed.

19.23 It is an offence under s387A for a person to persuade or incite a master or seafarer to breach his agreement, subject to a penalty of \$500. This provision was inserted in 1952. In light of contemporary workplace relations legislation, such a provision is anachronistic and should be repealed. Seafarers and their representatives should have the same rights to engage in industrial action as other sections of the workforce and be subject to the same constraints as provided under community wide industrial legislation.

Protection of Seamen

19.24 Division 16, ss139 to 148A covers a diverse range of matters designed to protect seafarer’s interests. These include allowing seafarers to go ashore to pursue complaints against their employers, unlawful boarding of vessels by outsiders, exemption of seafarers from jury service and prohibition from unlawfully leaving seafarers ashore.

19.25 Section 139 provides for a seafarer to go ashore to consult a proper authority on a matter related to employment on board a ship or for a purpose connected with legal proceedings against the master or a member of the crew. Seafarers are not to obtain leave to go ashore by false or misleading statements or for a frivolous or vexatious reason. These provisions recognise the isolated nature of a ship as a workplace and the fact that a seafarer cannot easily access external authorities after working hours. Permission would generally be needed to leave a ship to pursue the right to access legal or technical advice from authorities, and this should not be unreasonably constrained. Conversely, the costs of delays to a ship if a seafarer is absent can be high and absences for frivolous reasons should not be sanctioned.

19.26 Australia has ratified ILO Conventions No. 87 Freedom of Association and the Right to Organise 1948 and No. 98 Right to Organise and Collective Bargaining

¹⁷² Agreements certified under the *Workplace Relations Act 1996* remain in force until their expiry date and replacement by another agreement or they are terminated under Part VB Division 5 of the Act.

¹⁷³ Parties to a contract made outside the *Workplace Relations Act 1996* which remains binding may retain the option of seeking to rescind those agreements through civil action under common law.

1949. These conventions provide that workers and employers have the right to establish and join organisations of their choosing without prior authorisation and workers will have protection against acts of anti-union discrimination in respect of their employment. This protection should include the right of crew to access employee representatives and for representatives to access employees in the workplace.

19.27 Section 145 prohibits a person going aboard a ship without permission of the master before the crew have been discharged and left the ship, subject to a \$1000 penalty. To the extent that this provision may restrict access by employee representatives, it could be inconsistent with workplace relations legislation and should be repealed. Under workplace relations legislation, a union official requires the permission of an owner to enter a workplace. If permission is not forthcoming the union may apply for a permit from the registrar. Entry to workplaces without a permit or permission is treated as trespass with remedies under civil law.¹⁷⁴ While s145 of the *Navigation Act 1912* acknowledges entry of a person “authorised by law” or with “permission of the master”, the sanction of a \$1000 penalty for unlawful entry is inconsistent with modern industrial law. To the extent that s145 relates to other persons not connected with the employment of seafarers, it duplicates s388, which prohibits a person being on board unlawfully. Section 145 should be repealed.

19.28 Section 147 provides for seafarers on all ships to be exempted from jury service, whether under a law of the Commonwealth or a State or Territory. This provision recognised the long absences of a seafarer from his place of residence and the difficulties he would have in complying with an order to do jury service. It also recognised the traditionally casual nature of employment of seafarers and the fact that a period of jury service may mean a seafarer missing a voyage and hence impacting his livelihood.

19.29 With company based employment, seafarers should now have greater security of employment, and in most instances would spend a reasonable period ashore between voyages. A blanket exemption from jury service may no longer be warranted and seafarers could fulfil their duties in the same way as other citizens eligible to serve on juries.

19.30 Commonwealth and State juries laws, other than in Tasmania, however, do not presently allow for exemptions from jury service specifically for seafarers. State and Commonwealth juries laws do provide a general defence for persons to make a case why they may be excused jury service. It could be a defence under juries legislation in claiming an exemption from jury service that a seafarer is engaged on a voyage and is not able to return during the period called.

19.31 Industry representatives noted that a ship owner may have to meet the costs of repatriating a seafarer who agrees to perform jury service and also must employ a

¹⁷⁴ Under the *Workplace Relations Act 1996* a representative who holds a current permit pursuant to s285A may seek to enter and investigate any premises where employees work, subject to conditions, where the representative suspects that a breach has occurred of the Act, an award, order of the Commission or certified agreement that is in force. The permit holder is given additional powers to inspect documents and work machinery for the purposes of inspecting the suspected breach. Permit holders can also enter premises for the purposes of holding discussions with employees, but such discussions may only be held during employee’s meal breaks or other breaks.

replacement in order to keep a ship in service.¹⁷⁵ On balance, the exemption of seafarers from an obligation to do jury service probably assists the competitiveness of the industry by keeping such costs to a minimum. This provision should be retained.

19.32 S148A prohibits persons from wrongfully forcing a seafarer ashore or leaving him behind from a ship at a place outside Australia, subject to a penalty of \$5000 and/or 2 years imprisonment. This provision reflects the difficulties a seafarer would face if abandoned overseas, and should be retained in shipping law.

Property of Deceased Seamen

19.33 Division 17, ss149 to 160 provides detailed instructions for dealing with the property of seamen who die in the service of a ship, including the roles of the master and AMSA in accounting for the deceased's property and wages, and its disbursement. Again, these provisions reflect 19th century conditions of casual employment and lengthy absences from home. Under modern company based employment, it is the employer's responsibility for accounting for the effects and body of a deceased employee. This responsibility should be defined in the proposed legislation under duties of the employer, and the role of the authority should be repealed. Provisions detailing the roles of the master in accounting for effects should also be repealed and such matters handled under company based procedures.

Relief for Seafarers Families

19.34 To the extent that a family of a seafarer on a voyage claims relief from a public institution, Division 18, ss161 to 162, provides for the institution to reclaim the costs from the seafarer's wages. The principle is that the public purse should not bear the cost of supporting a seafarer's family when he is capable of doing this himself. These provisions now are anachronistic and should be repealed.

19.35 Modern company based employment arrangements and global banking and communication facilities should enable employees to make appropriate arrangements for wages or allotments to be paid to families while a seafarer is away from home. In cases where a seafarer has abandoned his family, the family would have the same entitlements to access social security payments as other members of the community. For the purposes of the social security legislation, seafarers and their families are no different from other occupations where a person is away from home for extended periods of time.

19.36 Social security assesses families on the income of both partners, unless the relationship is broken down. Failure to remit money, particularly in these days of global electronic funds transfer facilities, could be seen as a factor in supporting a claim that a separation has occurred. If the relationship is broken down and the couple consider themselves to be separated with an expectation that the relationship would not be resumed upon return to Australia, the spouse could be assessed for social security purposes without regard to the income of the partner.

19.37 The *Navigation Act 1912* provides that when the seafarer returns from a voyage, the public institution may seek reimbursement, within certain limits. Under

¹⁷⁵ Industry consultation workshop, Melbourne, 12 April 2000

the social security legislation there does not appear to be any equivalent direct obligation to reimburse social security payments if or when the seafarer returns.¹⁷⁶ Reimbursements from the seafarer's wages are not desirable as social security payments may be calculated without regard for the seafarer's income.

19.38 It is inconsistent to treat families of seafarers differently from those of other occupations receiving social security benefits and ss161 and 162 should be repealed. Repealing them would not affect a family's access to the public safety net provided under social security legislation.

Relief of Distressed Seamen

19.39 Division 19, ss163 to 163A provides for the making of regulations to give financial and other assistance to seafarers left behind or shipwrecked outside Australia, for their return to their home port or for burial. Costs incurred by the Commonwealth in providing this assistance are recoverable from the owner of the ship to which the seaman belonged. Marine Order 53 Employment of Crews prescribes matters relating to this Division. Section 85 in Division 10 provides for a seafarer to continue to be paid wages until his return home, where his employment is terminated by the loss of the ship.

19.40 Shipping law should continue to support the principles of ILO Convention 8, Unemployment Indemnity (Shipwreck) 1920, requiring a ship owner to continue to pay wages after a shipwreck or loss or foundering of a ship, and ILO166, Repatriation of Seafarers (Revised) 1987, which requires national laws or collective agreements to prescribe arrangements for repatriation and details of costs borne by the shipowner.

19.41 Although direct company employment would ameliorate the position of a seafarer in distress abroad, the law should reflect the seafarer's disadvantage in obtaining replacement employment or funding his return home if abandoned by the employer. An employer should continue to have the duty to return a seafarer to his home port and to continue to pay wages during a period of shipwreck, although s85 should be redrafted to reflect contemporary company employment arrangements.

19.42 While a seafarer would have access to ordinary consular assistance as a last resort in cases of distress overseas, such assistance normally requires the individual to bear the costs of any repatriation, either from their own funds or by reimbursement to the authorities. This is inconsistent with the principles embodied in ILO166, which places the onus of costs on the ship owner. There is also the prospect that a non-Australian citizen or permanent resident serving on an Australian ship is abandoned or shipwrecked. Such persons would not have access to Australian consular assistance, but would need to rely on their own national diplomatic representatives.

¹⁷⁶ Social security legislation provides for the repayment of debts owing to the Commonwealth as a result of incorrect payments or payments that should not have been made.

Recommendations

76. The legislation should repeal as far as possible regulation of employment arrangements that are no longer relevant, could be covered by community wide employment legislation or are inconsistent with modern workplace relations legislation, including

- (a) Section 2 allowing for appointment of superintendents and amend provisions for functions of superintendents to be carried out by AMSA;
- (b) Sections 83(1)(d) and 140 concerning assignment of seafarers' salvage rights in agreements, section 148 court powers to rescind agreements and section 387A prohibiting incitement to breach agreements;
- (c) Section 145 prohibiting a person from being on board without permission;
- (d) Section 148 for a court to rescind a contract; and
- (e) Sections 161-162 concerning reimbursement from a seafarer's wages of relief provided to a family.

77. The legislation should continue to provide for seafarer employment conditions where these reflect safe operations or specific shipping industry characteristics. These provisions should be framed in terms of the duties of ship owners and employers, including:

- (a) Duty not to take a ship to sea without an agreement in place between the employer and employees;
- (b) Duty of employer and master to permit a seafarer to go ashore to pursue a complaint or to seek advice, and duty of a crew member not to do so for frivolous reasons;
- (c) Exemption of a seafarer from the obligation to do jury service;
- (d) An employer's duty to account for the belongings of a deceased seafarer and for disposal of body and effects as reasonably required by next of kin. Repeal existing provisions in sections 149 to 160 dealing with property of deceased seafarer; and
- (e) Duty of employer and ship owner not to wrongfully leave an employee behind and to assist an employee left behind overseas to return to his home port and to provide for wages and maintenance in the course of his return.

20. FOREIGN SEAFARERS

Deserters

20.1 The provisions of Part III of the *Navigation Act 1912* deal with circumstances of deserters from foreign ships. Part III provides for apprehension and delivering to their ships of deserters from foreign ships, subject to authority from the diplomatic representative of the flag State of the ship. The provisions exclude Australian citizens serving on foreign ships from this regime, unless they give consent. Expenses incurred by Australian authorities in returning a foreign seafarer, either to his ship or to a place outside Australia, may be recovered from the consul or the ship's owner, agent or master.

20.2 The purpose of these provisions may have been to facilitate international trade by ensuring that a ship has sufficient complement of crew to operate and is not unreasonably held up by shortage of crew. They also support the principle that the public purse should not bear the cost of returning unwilling labour to a ship or of repatriating foreign seafarers who are left behind.

20.3 These provisions seem unwarranted in the modern era. Provisions regulating desertion from Australian ships were repealed many years ago. Forcible return of an employee to a workplace would be inconsistent with modern concerns for human rights, and employers have alternative, non-coercive ways to recruit replacement crew.

20.4 To some extent the provisions would assist in prompt treatment of foreign seafarers who may be seeking to illegally enter into Australia. However, this policy objective is not related to the principal purposes of the *Navigation Act 1912* and would be better handled under the *Migration Act 1958*. The Department of Immigration and Multicultural Affairs (DIMA) submitted that the *Migration Act 1958* powers are sufficient to meet the immigration aspects of desertion, and it would not be necessary to continue the *Navigation Act 1912* provisions for this reason alone.¹⁷⁷

20.5 To the extent that desertion is by an Australian citizen from a foreign ship, it would be outside the scope of the *Migration Act 1958*. It would not be acceptable practice to force an Australian citizen to return to a foreign ship against his will for what is essentially a contractual breach of employment obligations, and the *Navigation Act 1912* already exempts Australian citizens from this Part of the Act unless they consent.

20.6 In relation to a foreign seafarer working on an Australian ship, section 110 gives the Australian Maritime Safety Authority power to release a seafarer from prison and to convey him to the custody of the master of an Australian ship that is about to depart Australia. This again does not seem to be an appropriate power for the Authority under the *Navigation Act 1912*, although there may be a public benefit in saving the time and expense of removing a foreign person after he had served a sentence and his ship had departed. To the extent this provision may affect a foreign seafarer, it would be more appropriately included in the *Migration Act 1958*. To the

¹⁷⁷ Submission No. 39

extent that it relates to Australian citizens, the review sees no benefit in retaining this provision in the *Navigation Act 1912*.

20.7 The Commonwealth often relies on s186 of the *Navigation Act 1912* to recover from the owner or master of a ship the costs of removal of a foreign seafarer. The *Migration Act 1958* only provides for recovery of costs from the individual, which can be difficult to achieve. If relevant provisions covering removal of foreign deserters are repealed from the *Navigation Act 1912*, DIMA suggested that it would be appropriate to insert similar provisions in the *Migration Act 1958*.¹⁷⁸

20.8 Between March 1996 and April 1999, 263 desertions from foreign ships were reported by the Australian Customs Service. Of the 148 who were located, 53 applied to remain in Australia, 40 of these applying for refugee status. Only 17 applications were approved.¹⁷⁹ As the costs to authorities of finding and repatriating illegal immigrants can be substantial, it is appropriate that there be a mechanism to recover costs from the ship owner or operator. A requirement to reimburse costs of repatriation may also encourage ship owners and operators to more carefully select crew members that are not likely to seek to enter Australia illegally. The review agrees that when s186 of the *Navigation Act 1912* is repealed there should be a corresponding provision inserted into the *Migration Act 1958*.

Crew Conditions

20.9 A number of submissions have raised concerns about the social conditions aboard certain foreign ships.¹⁸⁰ This is in the context of a ship being a living community, as well as a workplace, where seafarers are required to spend considerable length of time. The abuse and neglect of foreign seafarers also has been raised in the Parliamentary Committee reports: “Ships of Shame” and “Ship Safe”¹⁸¹. There is a continuing interest in addressing foreign seafarer working conditions.

20.10 Minimum standards for seafarer employment and working conditions are established in a range of ILO conventions. As with the IMO conventions, primary responsibility for national laws to implement ILO conventions rests with the Flag State, although a Port State may impose conditions on entry to its ports and internal waters. The Flag State also has responsibility for determining any conditions of employment that go beyond the minima established by the ILO. The Attorney-General’s Department notes that Port State jurisdiction is not commonly exercised over activities internal to a ship unless they affect the peace, order and good governance of the Port State.¹⁸²

¹⁷⁸ Submission No. 39

¹⁷⁹ Senate Question on Notice No. 1177 and reply 8 May 2000

¹⁸⁰ Submission Nos. 10, 14, 15, 21, 25, 29, 31, 53 and 74

¹⁸¹ Commonwealth of Australia (1992) *Ships of Shame*, Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure Inquiry Into Ship Safety, AGPS, Canberra

Commonwealth of Australia (1995) *Ships of Shame - A Sequel*, Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, AGPS, Canberra

House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform (1998) *Ship Safe - An Inquiry into the Australian Maritime Safety Authority Annual Report 1996-97*, Commonwealth of Australia, Canberra

¹⁸² Submission No. 44

20.11 Nevertheless, there are safety/environment and humanitarian related interests for Australia in ensuring that foreign seafarers servicing our trade are not subject to gross exploitation or abuse. Several specific safety related employment matters, such as crew qualifications, safety manning or fatigue management, already are covered by international maritime conventions, including STCW and the ISM Code, and are managed under port State control inspection

20.12 Where working conditions aboard a foreign ship may affect its safe and environmentally responsible operation, these matters should also be addressed in the ships' ISM safety management system. They also should be subject to port state control inspection, and where relevant, detention or other penalties as provided for in the Act. Safety and environment protection related aspects of crewing include such matters as adequate food, water, medical treatment and accommodation. These issues should be addressed in the Act under the proposed new Part that defines owners', operators' and masters' duties and responsibilities to provide a safe and healthy working environment for all ships. This will provide some incentive for ship owners and operators to consider safety related aspects of their employees' welfare.

20.13 In assessing foreign vessels inspected under port State control, AMSA may take account of such factors as the quality of accommodation, food and water, and availability of medical treatment for the crew as being indicative of the state of the ship's safety management system. If these factors are found to seriously affect the standard of ship safety and pollution prevention, then AMSA can use its powers under the *Navigation Act 1912* to take corrective action, including detaining the ship.

20.14 However, if these factors do not impinge on ship safety and pollution prevention, then the Port State Control provisions of the *Navigation Act 1912* do not support AMSA's intervention on purely humanitarian grounds. Such matters as non-payment or under-payment of crew's wages, intimidation or physical abuse are not covered by the Port State Control provisions of the *Navigation Act 1912* unless they can be shown to seriously affect ship safety and pollution prevention standards.

20.15 The review sought clarification from the Minister of the extent to which AMSA's powers to intervene in regulation of working conditions for foreign seafarers should be addressed in the *Navigation Act 1912*. The Minister confirmed that AMSA should continue to have powers of inspection and enforcement to the extent that working conditions may affect the safe operation of a foreign ship and environmental protection, but that it would be inappropriate for AMSA to regulate other employment related matters, such as wages and criminal acts against crew members. Such matters should continue to be addressed under other legislation, such as the *Admiralty Act 1988* and the *Crimes at Sea Act 1979*. This approach is consistent with the proposed new focus of the revised *Navigation Act 1912* concentrating on safety and environmental protection outcomes.

Recommendations

78. All current matters in Part III of the *Navigation Act 1912* concerning foreign seafarers and section 110 in Part II concerning return to his ship of a seafarer imprisoned for summary offences should be repealed.
79. The *Migration Act 1958* should be amended to provide for recovery from the owner, agent or master of the ship of costs of removing a foreign seafarer and to provide for delivery to his ship before it departs Australia by immigration officers of a foreign seafarer imprisoned for summary offences.
80. Ship safety and marine environmental protection aspects of foreign seafarers working conditions should be addressed through all ships' ISM safety management systems and should be audited for compliance through port state control inspection programs.
81. AMSA should continue to have powers under the legislation, consistent with its safety and marine environment protection mandate, to also make judgements about foreign crew welfare standards where these raise safety or environmental issues.
82. Humanitarian concerns about other crew welfare matters, such as non-payment of wages or physical abuse, for foreign seafarers, should continue to be addressed under other civil or criminal legislation.

COMMERCIAL MATTERS

21. PASSENGERS

21.1 Part V of the *Navigation Act 1912* regulates a number of relationships between ship operators and passengers. These matters largely address the obligations of a ship operator to carry a passenger to the destination paid for, including in circumstances of wreck, and for a passenger to pay for his carriage. Other than the Bass Strait trade, there are presently very few passenger transport operations by Australian registered ships that come under the *Navigation Act 1912*. The bulk of the cruise shipping trade in Australian waters is conducted by foreign flagged ships.

21.2 TT Line submitted that there have been several instances of persons boarding a ship without paying a fare and of wilful damage to ship's equipment or obstruction of crew in performance of their duties.¹⁸³ Alternative options exist for prosecution for fare-evasion under civil law or criminal law for fraud or deception. However the cost of pursuing the former option is likely to outweigh the cost of fare avoidance, while prosecutions for fraud or deception could lead to penalties that significantly outweigh the severity of the offence and magistrates have been reluctant to record convictions against such charges. Penalty provisions should be retained in shipping law as a means of dealing with non-fare paying passengers in a way that ensure penalties are commensurate with the offence.

21.3 Some passenger provisions concern the behaviour of passengers and provide the master or crew of the ship with powers to prevent a person from endangering the vessel or life aboard. A passenger on a ship is different in some respects from a passenger on other modes, as he cannot be easily put off the vessel and can be a serious nuisance or a safety threat when the vessel is isolated at sea. Offences of dangerous behaviour could potentially be prosecuted under Crimes at Sea legislation if of a serious enough nature. However, this would be a post-event prosecution and would not assist in the prevention of hazardous situations.

21.4 It is desirable to maintain similar arrangements to control behaviour for safety reasons, and the concepts could be grouped with other safety and "duty of care" principles in a restructured Act. The master's authority to detain and/or restrain dangerous persons should also be identified.

21.5 The *Navigation Act 1912* makes provision for regulations to be made encompassing a wide range of matters affecting the carriage of passengers, including their health and safety, and matters of accommodation, provisions and medical care. Regulation of passenger matters is generally confined to Australian registered ships. The Department of Health and Aged Care submitted that there is a need to regulate the standards of public health for cruise vessels to prevent the introduction into Australia and propagation of contagious diseases aboard such ships.¹⁸⁴ This follows recent incidents involving foreign flag cruise ships bringing infected passengers to Australia, where there are no applicable Commonwealth laws to address this issue and State public health laws had to be used.

¹⁸³ Submission No. 45

¹⁸⁴ Submission No. 25

21.6 As a general rule the standards of passenger accommodation and ship operations affecting passenger health are a matter for the Flag State to regulate. There are no international agreements regulating such matters and it would be difficult for a port state to conduct Port State control checks and order remedial actions to correct what we perceive as deficiencies in a ship's passenger accommodation or facilities. It would not be appropriate to extend any Australian standards to such ships.

21.7 With regard to the policy objective of prohibiting entry into Australia and spread of communicable diseases via passengers of foreign cruise ships, the review considers this is a border control or public health function. There is clearly a significant public health issue here, but it is one that is more appropriately addressed outside the review of the *Navigation Act 1912*. It is more a matter to be addressed under quarantine or health legislation if additional powers are required by the relevant authorities.

Recommendations

83. The provisions in Part V, sections 272 to 276 and 282 relating to contractual matters between ship operators and passengers should be retained.

84. The powers of the master and crew under sections 278 to 281 to control passenger behaviour for safety reasons should be retained and grouped with other safety matters and passengers included in "duty of care" principles.

85. The provision of additional powers to prevent entry of communicable diseases by passengers on foreign flag cruise ships should be addressed under quarantine or health legislation rather than the *Navigation Act 1912*.

22. WRECK

22.1 The purpose of the wreck provisions is to ensure that the public interest is met by having an orderly system to assist persons in distress and for collection and disposal of goods and other property that are recovered from a wreck when there is no salvor or owner present. Matters relating to removal of hazardous wreck for safety purposes are dealt with in Chapter 17. The current provisions largely reflect arrangements in the days when it was necessary to protect persons and property in a distressed state from murder and looting. Wide powers were given to the Receiver of Wreck to commandeer resources and to use force in suppressing plunder. The Act also makes provision for title to unclaimed wreck to be vested in the Crown in right of the Commonwealth.

22.2 It has been held¹⁸⁵ that legislative provisions are necessary in respect of wrecks to meet the following objectives:

- to discourage the plundering or interference with shipwrecks, either of the cargo and equipment aboard or the fabric of the vessel, by unauthorised persons;
- to prevent interference with the remains of sunken ships, particularly where they are of historical significance to the nation;
- to make provision for the custody of wrecked ships, equipment and cargo pending reclamation by their owners; and
- to provide for the disposal of such property in the event of no claim of ownership.

22.3 An additional objective is to create an obligation and a means of rendering prompt assistance to a ship and persons in distress.

22.4 The *Navigation Act 1912* gives effect to all of these objectives in the following ways:

- Where a ship is wrecked within Australian waters, a local receiver of wrecks is required to render assistance to preserve the ship and the lives of persons aboard (s296). In doing so, the receiver may commandeer persons and equipment and it is an offence for any person to wilfully disobey any directions of the receiver. Persons and equipment engaged in the rescue may pass over any lands and any damage incurred is a charge on the wreck (s298).
- The receiver may also apprehend persons engaged in plunder or obstruction of rescue efforts, may use force in doing so and is absolved of liability in the event of injury, or death of any persons resisting the receiver or persons acting under his directions (s299). Officers of Customs or the police may execute the powers of the receiver in the absence of the receiver (s300).
- The receiver is required to conduct an examination of the circumstances of the wreck and to make a report to the Australian Maritime Safety Authority (s301).
- Ss302 to 312 specify the rights and duties of individuals in respect of wrecks found around Australia or who bring a wreck into Australia. Anyone who either

¹⁸⁵ Davies and Dickey (1990), *Shipping Law*, The Law Book Company, Sydney, p379

finds or takes possession of a wreck must give notice of the fact, and of any marks by which the wreck may be recognised, to the receiver of wrecks. No-one other than an owner is permitted to retain possession of a wreck. A non-owner is required to deliver a wreck within his possession to the receiver on demand. The receiver must post a description of any wreck in his possession in the nearest Customs House.

- An owner has one year in which to establish his claim to the property and may take possession upon paying any salvage fees or expenses. If a wreck is not claimed within 12 months, the receiver must sell the property and pay the proceeds to the Consolidated Revenue Fund. Provision is made for the receiver to sell the wreck before 12 months has elapsed where it is of less than \$40 value, is of such condition that it should not be kept or is of insufficient value to pay for keeping. The owner may then have a claim to the proceeds of sale (ss305-309).
- Disputes as to title of a wreck may be treated as if it were a dispute on salvage or may be taken to a court of competent jurisdiction for resolution (s311). Offences are created in relation to removing a wreck from Australia (s312), boarding a wreck without permission (s313) or impeding saving of a vessel or secreting or wrongfully removing a wreck (s314).

22.5 It is necessary to maintain an orderly system for dealing with wreck, but these provisions are now anachronistic and inconsistent with modern circumstances and administrative practice. Responsibility for physically assisting persons in distress and handling of wrecked property that is washed ashore or found in or near coastal areas should rest with State police and other emergency services, reflecting contemporary practices. The related wreck provisions of the *Navigation Act 1912* should be repealed.

22.6 It will be necessary for full discussions to be held with the States and Northern Territory to ensure that this approach is practicable and that State and Territory laws adequately cover the circumstances of wreck dealt with by the current Act. States and the Northern Territory have raised a number of issues that would require resolution before this proposal could be implemented.¹⁸⁶ These include:

- the adequacy of State and NT resources to fulfil this task;
- the need for and ability of States to exercise jurisdiction beyond 3 nautical miles;
- consistency with Australia's international obligations;
- the need to amend State legislation to accommodate any changes in definition of wreck or extent of jurisdiction;
- resolution of native title issues in offshore areas; and
- interaction with other Commonwealth and State agencies with an interest in or legislative responsibility for removal of unclaimed wreck.

22.7 State police already have some responsibilities under State law for responding to persons in distress along the coast and for taking control of unclaimed property until an owner can be found or the property otherwise disposed of. The provisions of

¹⁸⁶ Correspondence: NT Department of Transport and Works 3 February 2000, Queensland Transport 7 February 2000, Transport SA 11 February 2000, NSW Department of Transport 10 February 2000. Transport WA 18 February 2000 and Attorney-General's Department 17 February 2000.

the Act are not clear as to whether Commonwealth or State law should apply to a wreck on the coast, and it is likely that both legal systems apply. Police can and do operate some distance out to sea to effect recovery of wreck and persons in distress. State laws generally make similar provisions to the *Navigation Act 1912* for taking possession of property, identification of the owner and for disposal of unclaimed property. Consideration will need to be given to vesting title in unclaimed wreck to the Crown in right of the relevant State.

22.8 The Receiver's role in assisting persons in distress is now redundant in light of modern search and rescue procedures and should be repealed. The general duty to assist persons in distress should be spelt out in the proposed new Part of the Act defining the responsibilities of various parties.

22.9 This arrangement would not extend to the coordination of search and rescue activities currently undertaken by the AusSAR centre within AMSA. AusSAR operates under s6 of the *Australian Maritime Safety Authority Act 1990*, and would be unaffected by any repeal of wreck provisions in the *Navigation Act 1912*.

22.10 Section 301, concerning examination by the Receiver of the circumstances of wreck, is also redundant in light of the functions of the Marine Incident Investigation Unit (MIIU). The MIIU is established by regulations made under s425(1)(ea) of the Act for the purpose of conducting investigations into casualties affecting shipping, including loss of life and loss of a vessel.

Recommendations

86. All provisions of Part VII, Division 2 concerning treatment of wreck, except section 314A, should be progressively repealed.
- (a) Sections 296 to 301 should be repealed immediately
 - (b) Sections 302 to 314 should be repealed once suitable alternative arrangements have been agreed with the States and Territories to address these matters.

23. SALVAGE

23.1 The regulation of salvage operations is provided to:

- impose an obligation to assist persons in distress;
- provide an incentive for promptly rescuing life and property at risk through provision of rewards and compensation for salvors, including the creation of a lien over any salvaged property to secure such rewards; and
- encourage efforts to prevent damage to the environment even where property cannot be saved.

23.2 S315 of the *Navigation Act 1912* applies certain provisions of the International Convention on Salvage 1989, which entered into force on 14 July 1996. The convention replaces an instrument adopted in Brussels in 1910 which incorporated the "no cure, no pay" principle that had been in existence for many years and was the basis of most salvage operations. The revised convention provides greater incentives for effective and timely salvage operations and to assist with protection of the environment.

23.3 The former section 315 of the Act was repealed on 9 June 1997 when the amending legislation implementing the terms of the Convention came into force. Section 315 now provides that articles 6-8, 12-19, 21-22, 26 and 30 of the Salvage Convention and the common understanding of Articles 13 and 14 have the force of law in Australia.

23.4 Articles 6 to 8 of the Convention provide that the provisions of the convention may be replaced by a contract, either expressly or by implication, but that contracts which are too onerous or applied with undue influence may be nullified or modified, and specify the duties of the owner, master and the salvor in relation to each other.

23.5 Articles 12 to 19 provide for the right to a reward for salvage operations that have a useful result, specify the criteria for fixing the level of reward, the apportionment of rewards among several salvors, prohibits remuneration from persons whose lives are saved and places limits on the rights to claims for salvage rewards in the event of misconduct, pre-existing contracts and express denial of permission by an owner.

23.6 Articles 21 and 22 provide for payment of security and interim payments against claims. Article 26 prohibits seizure of humanitarian cargoes if the donating State has agreed to pay for salvage services in relation to those cargoes. Article 30 provides for a contracting State to make reservations in relation to excluding application of the convention to vessels and property in inland waters, where all interested parties are nationals of the state and to historical maritime cultural property.

Duty to Assist

23.7 A fundamental provision of traditional salvage law has been that, for a salvor to be entitled to any reward, the services provided must be successful in saving at least some part of the endangered property. Any salvage reward is technically payable only from the fund in court represented by the salvaged property. Without successful salvage there is no fund from which any reward can be made. It is for this reason that

salvage rewards could not be paid for saving life alone. The public interest in saving life at sea therefore traditionally was met by imposing an obligation on persons to assist in saving life, rather than by creating a financial incentive to do so, although Article 13(e) of the Salvage Convention now entitles a salvor of human life to a fair share of the payment awarded to the salvor for salvaging the vessel or other property, or preventing or minimising damage to the environment.

23.8 A master of a ship is compelled under s317A of the *Navigation Act 1912* to render assistance to another ship or person in distress at sea. Failure to comply is punishable by imprisonment for up to ten years. This provision duplicates to some extent the obligation to render assistance imposed under s265, and there are a number of differences between the two provisions that should be removed. For example, the penalty for breach of s265 is a fine of \$10,000 and/or 4 years imprisonment. Section 265 applies only to an Australian ship (i.e. one to which Part II of the act applies) whereas s317A applies to all ships. Shipping legislation should retain a duty for a master to go to the assistance of persons in distress at sea, subject to appropriate penalties.

23.9 United Salvage submitted that there is an inequity in the Salvage Convention, in that the Convention provides for a salvor of life to make a claim against the salvage award after the event, ie after the award for salvage of property has been finalised and without the circumstances of life salvage being taken into account when the remuneration is assessed.¹⁸⁷ It was suggested that this discrepancy was recognised in the UK, which amended UK law when that nation adopted the 1989 Salvage Convention.

23.10 The UK Secretary of State's Representative, Maritime Salvage and Intervention advised that Section 224(1) of the UK *Merchant Shipping Act 1995* applies the provisions of the Salvage Convention 1989, including Article 13. Further provisions are made under s224(2) of that Act which extend the provisions of the convention. Schedule 11, Part 2, section 5 provides that where services are rendered within UK waters for saving life from a vessel of any nationality or elsewhere in saving life from a UK ship, and sufficient funds are not available from salvage of the vessel or other property, the Secretary of State may make a discretionary payment to the life salvor. He noted that British salvors are aware of the potential for a life salvor to claim part of an award received for salvaging property, but no claim for life salvage has been made in at least the last 20 years.¹⁸⁸

23.11 The provision in UK law for a discretionary payment from the Secretary of State is similar to a former provision of the *Navigation Act 1912* prior to its replacement by the current s315 that implements the Salvage Convention. The former s315(3) also stemmed from the British *Merchant Shipping Act 1894* and was considered redundant at the time of its repeal in 1997. As far as the Department of Transport and Regional Services and the Australian Maritime Safety Authority are aware, no claim or payment had been made under this provision.

23.12 A solution would be to add a requirement in shipping law that a salvor of life who intends making a claim is required to make the claim concurrently with or

¹⁸⁷ Submission No. 8

¹⁸⁸ Submission No. 68 and communications 3 June 2000.

through the claim for salvage against the property. A claim made after the award for salvage of property is finalised would not be permitted. In this way the total claims may be considered jointly and an appropriate award made that recognises the efforts of both salvors of life and of property. The onus would be on the salvors of life to ensure their claims are lodged promptly, and the potential disadvantage to salvors of property would be removed. The review recommends this approach be adopted.

Environment Protection

23.13 With growing attention paid to protection of the environment, and consequent intervention by governments in salvage situations which pose a threat to the marine environment, salvage responses may incur significant costs directed at minimising environmental impacts but with reduced chance of successful recovery of the vessel or its cargo¹⁸⁹. Salvors became increasingly reluctant to spend time and money on salvaging a vessel with little hope of receiving a reward.

23.14 The 1989 convention, under Article 14, seeks to remedy this by making provisions for "special compensation" to be paid to salvors when there is a threat to the environment. This consists of the salvor's expenses plus 30% if environmental damage is minimised or prevented, but this can be increased to 100% in certain circumstances. Article 14 also provides that if a salvor has been negligent and failed to prevent or minimise environmental damage he may be deprived of the whole or part of any special compensation due.

23.15 This concept shifts the costs of pollution prevention and mitigation efforts from the public to vessel owners and insurers. Availability of a reward for environmental efforts should encourage salvors to provide vessels and crews for environmental protection as well as property recovery, and so relieve taxpayers of this burden.

23.16 United Salvage also raised a potential conflict between environmental legislation and the Protection of the Sea (POTS) legislation.¹⁹⁰ *The Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) empowers the Minister for the Environment to direct a wide range of interests and requires various parties to seek permits or accreditation of arrangements from the Minister before undertaking actions that may have a significant negative impact on the environment. The timeframes involved in applying for and granting of permission are extensive. Certain actions involved in salvaging a vessel that may result in pollution may be permitted or directed under the POTS legislation. Even where a salvor is directed to take such action under the POTS legislation, there is no necessary protection of the salvor from prosecution under the EPBC Act.

23.17 The review notes the potential conflict in the legislation and considers this anomaly should be rectified in consultations between the Department of Transport and Regional Services, AMSA and the Department of Environment and Heritage. However, it is not a matter for the *Navigation Act 1912*.

¹⁸⁹ For example, in the 1996 *Iron Baron* incident, port authorities refused to allow the salvaged vessel into port because of problems with its structural integrity and the possibility of remaining oil on board causing further pollution in the port. This ultimately led to the vessel being dumped at sea.

¹⁹⁰ Industry workshop Sydney, 6 April 2000

Salvage for and by the Crown

23.18 Salvage rights are extended both against and on behalf of the Crown under ss329B and 329C. It is in the public interest that salvage claims should be allowed against the Crown, to encourage persons to save life and property belonging to the Crown. Similarly, Crown agents should comply with the general obligation to assist persons in distress and should have the option of sharing in the reward for saving property where they may well risk their own lives or injury. Salvage claims by naval crews are addressed under the *Defence Act 1903*, as amended by the *Defence Legislation Amendment Act 1988*.

23.19 Under s329B claims for salvage do not lie against the Commonwealth or the Australian Postal Corporation¹⁹¹ concerning an article in the course of post by sea. This provision was added in the 1950s and is intended to provide a generic protection against the costs of salvage claims for mail. It is a protection not available to Australia Post's competitors. There is no general provision in the international convention dealing with postal services, the Universal Postal Union Convention (UPU), protecting mail from liability claims for salvage. Under the convention, a country's mail service authority is responsible for loss or damage to articles in the course of post until they are handed over to the next country's mail service. The mail authority is therefore liable for loss or damage even if the mail is not directly within its control, for example in transit aboard a ship or aircraft.

23.20 In the absence of domestic legislation exempting it from liability for salvage claims, Australia Post would need to put in place any liability limitation measures it considers are necessary through its contracts of carriage. For example, other courier and parcel carriers place a general indemnity clause in the contracts of carriage. Australia Post has indicated this would be less efficient than legislation and could be difficult to apply in practice to millions of articles of mail.¹⁹²

23.21 Overall, the review considers that this issue is not of great significance, but that competition elements need to be addressed in the context of postal policy and legislation, not shipping law. The exemption provided to claims against the Commonwealth and Australia Post for articles in the course of post should be repealed from the *Navigation Act 1912*. If such exemption is considered necessary from a postal policy perspective, an appropriate exemption provision should be inserted into the *Australian Postal Corporation Act 1989*. The Department of Communications, Information Technology and the Arts indicated support for this approach.¹⁹³

Seafarer Agreements

23.22 Part II s83(1)(d) prevents any agreement that prevails upon a seaman to give up his rights to salvage and s140 prevents the assignment or sale of his salvage right before it accrues. These provisions were designed to protect the interests of seamen assisting in salvage operations, who may not have full information on their rights, and

¹⁹¹ It is proposed that Australia Post be changed from a statutory corporation to a Corporations Law company under amendments to the *Australian Postal Corporation Act 1989* soon to be introduced to Parliament.

¹⁹² Correspondence, 22 February 2000

¹⁹³ Correspondence, 28 February 2000

to encourage their exertions to save life and property. Salvage entitlements of a crew member potentially may be significant. However, it is questionable whether such provisions remain relevant in an era when sailors are better educated about their rights and may wish to trade such rights against other conditions of employment under modern enterprise employment agreement negotiations.

23.23 United Salvage supported removal of this proscription, noting it would open the way for salvage companies to negotiate specific employment conditions for salvage crews in company based agreements.¹⁹⁴ However, the Australian Council of Missions to Seafarers submitted that it is incorrect to assume that seafarers would have any training covering salvage and that legislative protection is still required.¹⁹⁵ On balance, the review considers that Australian seafarers have access to the necessary advice and negotiating power through their industrial representative organisations and that it would be appropriate to repeal both s83(1)(d) and s140.

Jurisdiction of Courts

23.24 The salvage and wreck provisions of the *Navigation Act 1912*, other than for removal of hazardous wreck, do not extend to historic shipwrecks. Such vessels are governed under the *Historic Shipwrecks Act 1976* and related State and Territory legislation. Salvage provisions in Division 3 also do not apply to offshore industry fixed and mobile units engaged in exploitation of natural resources, vessels or property in inland waters, or historical maritime cultural property on the seabed. It is appropriate that these exemptions remain, to maintain consistency in coverage of the vessels under other Commonwealth or State legislation.

23.25 Otherwise, the salvage provisions apply to all vessels (s317) whenever judicial or arbitral proceedings relating to the provision of salvage operations are brought in Australia (s316). This provision would allow scope for salvage claims to be brought to Australian courts where a ship has been rescued well away from Australia or salvage retrieved from the deep ocean should the parties wish to use Australian jurisdiction. The latter circumstance is the subject of draft convention negotiations within the IMO.

¹⁹⁴ Sydney Workshop, 6 April 2000

¹⁹⁵ Submission No 53.

Recommendations

87. The legislation continue to provide for salvage claims to be heard in relation to all ships where claims are brought in Australia, except as provided otherwise in section 316.
88. The legislation should not be applied to historic wrecks declared under Commonwealth and State or Territory legislation.
89. The obligation imposed under section 317A to render assistance to persons in distress should be combined with similar provisions under s265, and regrouped under the general duties of persons involved with shipping. The obligation should extend to all ships in Australian waters and all Australian ships wherever they may be.
90. The legislation should continue to apply the provisions of the Salvage Convention, as provided in section 315.
91. The legislation should include a time limit on claims for life salvage, by requiring all such claims to be made through or in conjunction with claims for salvage of property, and by prohibiting a claim for life salvage to be made after a claim for property salvage has been finalised.
92. The legislation should continue to provide for salvage claims to be made by or against the Crown on the same basis as if they were by or against a private person, as provided in sections 329B and 329C.
93. The exemption provided in section 329B to claims against the Commonwealth and Australia Post for salvage of articles in the course of post should be repealed and a similar provision enacted in the *Australian Postal Corporation Act 1989* if it needs to be retained for postal purposes.
94. The prohibition on a seafarer trading salvage rights in an agreement of employment (sections 83(1)(d) and 140) should be repealed.

24. LIABILITY

24.1 The *Navigation Act 1912* retains three provisions affecting liability in relation to shipping operations. These are:

- Ss259-263, Division 11, Part IV dealing with division of loss in the event of an incident involving two or more ships;
- S338, Part VIII exempting a shipowner from liability in certain cases of loss or damage to goods; and
- S410B, Part XI concerning liability of a master or owner of a ship under pilotage;

Division of Loss and Damages for Personal Injury

24.2 Division 11 of the *Navigation Act 1912* covers the rule on the division of loss and makes provisions concerning damages for personal injuries. These provisions recognise the longstanding principle of apportionment of loss in proportion to the degree of fault of each ship involved in a collision. This principle was originally recognised in English law with the enactment of the *Maritime Conventions Act 1911* applying the Convention for the Unification of Certain Rules of Law with Respect to Collisions 1910.

24.3 Section 259(1) provides that the liability for any damage or loss caused to one or more ships including their cargoes or freight or to any property on board is to be apportioned to each ship on the basis of its fault. If it is not possible to apportion fault after considering the circumstances of the case, then liability is to be apportioned equally.

24.4 Section 260 provides that where loss of life or personal injury is suffered by any person on board a ship owing to the fault of that ship or any other, the owners' liability will be joint and several. This does not deprive any person of any right of defence or right to limit liability as provided by law. Section 261A extends sections 259, 260 and 261 to apply to ships of the Royal Australian Navy.

24.5 Section 263 abolishes the statutory presumption of fault whereby a ship which was found to have infringed the Convention on International Regulations for Preventing Collisions at Sea 1972 (COLREGS) would be held to be at fault. The section provides by reference to the British *Merchant Shipping Act* that a ship is not deemed to be at fault solely because it infringed any of the COLREGS. Rule 2 of the COLREGS acknowledges that observance of its Regulations does not mitigate the need for each ship to also practice good seamanship in accordance with its circumstances.

24.6 Section 265A applies the liabilities imposed by the Division on any person responsible for the fault of the ship including charterers and others responsible for the navigation and management of the ship.

24.7 The provisions covering liability and division of loss are a part of established maritime law and should be retained in the legislation. However, they do not directly further the objective of enhancing ship safety and marine environment protection, which the review recommends should be the primary purpose of the Act.

Consequently, it is proposed that these provisions should be transferred to a separate part of the Act dealing with other matters unique to shipping.

24.8 The reference in section 261A to Royal Australian Navy ships should now refer to all vessels of the Australian Defence Forces.

Shipowner's Exemption from Liability

24.9 Section 338 of the *Navigation Act 1912* provides for a ship owner to limit his liability for loss or damage to goods in certain circumstances of fire or robbery, embezzlement or other forms of theft. This provision was left in the *Navigation Act 1912* when other limitation of liability provisions were repealed with the introduction of the *Carriage of Goods by Sea Act 1991* (COGSA) and the *Limitation of Liability for Maritime Claims Act 1989*.

24.10 The purpose of the provision is to provide some protection for a ship owner operating as a common carrier. It reflects similar provisions in State common carrier legislation dating back to a similar period in the early part of the century. Under common carrier legislation, a ship owner is not permitted to decline to carry a consignment and is responsible for the care of the consignment while in his possession. A ship owner should have the opportunity, from an equity perspective, of insuring goods consigned to his care. If a consignee fails to notify him of the value of the goods consigned, he is entitled to limit his liability against their loss.

24.11 The current section 338(a) however, appears to duplicate the COGSA legislation in limiting liability for loss due to fire. The COGSA legislation implements the Hague rules for limitation of liability, as set out in Schedule 1 of COGSA. Schedule 1, Article 4.2(b) states that “neither the carrier nor the ship shall be responsible for loss or damage resulting from fire, unless caused by fault or privity of the carrier.”

24.12 There is some discrepancy between section 338(b) and Article 4.5 (a) of Schedule 1 of the COGSA legislation. Section 338(b) suggests that a ship owner has no liability for loss of precious goods which have not previously been declared to the owner or master of a ship. On the other hand Article 4.5(a) of COGSA provides for a modest liability for loss or damage to goods which have not previously been declared by the shipper. This discrepancy may cause some legal confusion, which should be removed.

24.13 One matter which may explain the different approaches could be that the COGSA legislation is aimed at consignment of goods as cargo, whereas the *Navigation Act 1912* provision is more general and may also encompass personal effects of a passenger, for example.¹⁹⁶

24.14 TT Line submitted that section 338(b) should be retained as the COGSA and *Limitation of Liability for Maritime Claims Act 1989* do not fit squarely with their vehicle and passenger operations across Bass Strait. TT Line suggested that the Commonwealth should adopt the Athens Convention and that consideration should be

¹⁹⁶ Submission No. 9

given to expanding s338(b) to address current types of valuable goods carried by passengers, such as computers, cameras and so on.¹⁹⁷

24.15 The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. It declares the carrier liable for damage or loss if the incident causing the damage or loss occurred in the course of carriage and was due to the fault or neglect of the carrier. Unless the carrier acted with intent or recklessly, he can limit liability to US\$63,000 for personal injury or death, with other limits applying to damage to cabin luggage, other personal luggage, or vehicles. The 1990 Protocol to the convention increased the amount of compensation payable to US\$235,000 for death or injury, as well as increased limits for luggage. Further review of the convention is under way, to take account of liability regimes for carriage of passengers and luggage in the aviation industry, and considering the introduction of compulsory insurance, strict liability and increased limits of compensation. These measures are being considered to encourage wider adoption of the convention.

24.16 Australia has not yet ratified the Athens Convention. Only 26 nations have signed the convention, representing about a third of world tonnage, and 23 have signed the 1990 Protocol. Australia's concern, shared by many Western nations, has been the relatively low limits of compensation available to passengers under this convention.

24.17 Should the review of the Athens Convention result in compensation limits that are acceptable to Australia, and Australia decides to adopt the convention, it would be consistent with the approach taken towards other liability conventions that Australia give effect to it through separate legislation.

24.18 In the meantime, the review considers this aspect of liability limitation in the *Navigation Act 1912* to be outdated, and inconsistent with other legislation limiting liability for carriage of goods. Section 338(b) should be repealed from the *Navigation Act 1912* and replaced by separate legislation dealing with compensation and liability limitations for passengers and their luggage.

Pilot Exemption from Liability

24.19 Part XI, s410B of the *Navigation Act 1912* provides that the master of a ship under pilotage remains responsible for the safe conduct and navigation of the ship, and that the owner or master is responsible for any loss or damage caused by a ship under pilotage in a compulsory pilotage area declared by reason of a State or territory law.

24.20 This provision is supported by Marine Order 54, which provides that a pilot is not personally liable for damages resulting from an incident provided the pilot acted in good faith, regardless of whether the engagement of the pilot was compulsory or voluntary. However, the provisions of the Act and the Marine Order are different enough to suggest they should be revised. Section 410B should be revised to provide

¹⁹⁷ Submission No. 45

explicitly that a master is responsible for the safe operation of a ship at all times and is not relieved of this responsibility where a ship is under pilotage, whether the pilotage is compulsory under a State/Territory or Commonwealth regime, or voluntary.

24.21 There is a question of the extent of pilot exemption from liability, notwithstanding the overall responsibility of the master for the safety of the vessel.¹⁹⁸ The general principle, adopted internationally, that pilots should not be held liable for damage caused by ships under pilotage, was introduced in the days when governments mandated the use of pilots that they themselves provided through their own port authorities. It was therefore a device by governments to relieve themselves of liability for any pilot error, and to place the burden of liability on ship owners.

24.22 Under modern arrangements, whereby ports and coastal pilotage services now operate commercially and some pilot services are operated by the private sector, this form of protection could be considered counter to national competition policy principles. As well, there may be an incentive to pilots to take greater care in navigating ships if they faced liability for their mistakes. One third of incidents investigated by the MIIU in 1996-97 involved ships under pilotage that grounded or were involved in collisions.

24.23 The counter argument, put by pilotage companies, is that the costs to pilots of liability insurance would either force many operators out of business or would be passed on to shipping. Higher shipping costs would make Australian businesses less competitive internationally, and the potential loss of skilled pilots from the industry would be counter to the objective of enhancing safety and environment protection. It also is argued that the most effective sanction against pilot negligence is the power to revoke a pilot's licence and thereby remove a pilot's livelihood.

24.24 The policy aim is to ensure that adequate funds are available for compensation and pollution clean up in the event of an incident, and that this can best be achieved by making the ship owner liable for any losses. If pilots' liability exemption is removed, it would be necessary to ensure that pilots carry sufficient insurance to meet their liabilities, and that the public interest would not be exposed to a funding shortfall. Shipowners already have relevant insurance cover through P&I Clubs. It is unlikely that premiums for shipowners would be reduced in the event that pilots had to take out separate insurance cover, nor would the much smaller pool of pilots be likely to obtain competitive insurance rates comparable to those for shipowners. It is possible that total costs passed onto the shipper would increase, while the availability of funds for pollution clean up could decrease or at best remain the same.

24.25 Removal of pilots' exemption from liability would be ahead of general international practice and may present problems of consistency with the international regime. The revised Act should continue to place responsibility and liability on the owner and master of a ship even where it is under pilotage. While this may not provide as direct an incentive for a pilot to act professionally, provisions for cancellation or withdrawal of a pilot's licence to operate if he is found incompetent or negligent are a sufficient penalty and provide incentive against unprofessional behaviour.

¹⁹⁸ Submission Nos. 10 and 23

Recommendations

95. The legislation should retain provisions in sections 259 to 263 reflecting established maritime law for the division of loss, damages for personal injuries, the right of contribution and abolition of the statutory presumption of fault. However, these provisions should be transferred to a separate part of the Act.
96. Section 338 providing for shipowners to limit liability for loss or damage to goods in certain circumstances should be repealed and replaced by separate legislation regulating compensation for passengers and their luggage.
97. The legislation should retain the shipowner's and master's liability for damages caused by a ship under pilotage, as well as sanctions against a pilot's licence if he is found negligent or incompetent.

ADMINISTRATION

25. ADMINISTRATION

Smuggling by crew

25.1 The *Navigation Act 1912*, s101 provides for a ship owner or master to recover costs by a deduction from wages of an employee who has caused loss to the owner or master through acts of smuggling. This provision is outdated and unnecessary and should be repealed. With the move to company based employment, this matter is more appropriately dealt with within company disciplinary codes and enterprise agreements. The actions available under civil law to employers to recover from employees any loss or damage arising from criminal acts also would apply. The public interest is properly met under the *Customs Act 1901*, which provides sufficient penalty against persons attempting to smuggle goods into the country.

Stowaways

25.2 The *Navigation Act 1912* deals with stowaways in s104 by imposing a penalty on persons for going to sea without proper consent from an authorised person. Contravention of this provision attracts a fine of \$1000. This may be inconsistent with Australia's obligations under the UN Convention Relating to the Status of Refugees 1951 and Protocol of 1967, where a person may have a legitimate claim for protection under the convention. The Department of Immigration and Multicultural Affairs (DIMA) submitted that it may be more appropriate to deal with non-citizen stowaways under the *Migration Act 1958*, as that department would be in a better position to ensure compliance with Australia's obligations under the relevant human rights treaties.¹⁹⁹

25.3 The *Migration Act 1958* provides for the regulation of entry of persons, determination of their legal status and removal of illegal entrants. It also provides for offences and penalties for bringing illegal entrants into the country and places the burden of removal costs on the carrier. These provisions meet the public interest in regulating against foreign stowaways, which is to provide a disincentive to potential stowaways so as to prevent illegal immigration.

25.4 Section 104 of the *Navigation Act 1912* should be repealed, although the subsection subjecting a stowaway to the general discipline of a master aboard a ship should be retained for safety reasons.

25.5 In modern shipping operations, a master may not be aware of the presence of stowaways on a ship, particularly if they have gained access via containers loaded away from a port. While the penalties imposed on a master for bringing in illegal aliens is a source of complaint for the shipping industry, it is a *Migration Act 1958* matter and not one for the review of the *Navigation Act 1912*.

25.6 To the extent that Australian citizens may stowaway on a domestic voyage, this falls into the general category of non-payment of a fare and is a matter between

¹⁹⁹ Submission No. 39

the ship owner and the individual. There is provision in Part V, Passengers, of the Act for action to be taken against a person not paying a fare. For stowaways on outbound ships, the responsibility for prevention of illegal immigration into other countries is one for each country to determine.

25.7 There is an anomaly in the treatment of persons rescued at sea who are brought into Australia without proper documentation. The *Navigation Act 1912* imposes an obligation on ships' masters to go to the assistance of persons in danger at sea (s317A), consistent with international convention obligations. Failure to render assistance is an offence punishable by up to 10 years imprisonment. However, the *Migration Act 1958* and regulations do not specifically make allowance for masters who bring in rescued persons, and they are treated in the same manner as for stowaways, with a master punishable by a fine of up to \$10,000.

25.8 This discrepancy has been recognised and a master would generally not be prosecuted under the *Migration Act 1958* as a matter of policy. Now that the *Border Protection Legislation Amendment Act 1999*²⁰⁰ has passed, DIMA has indicated that the Migration Regulations will be amended to remove this anomaly by providing that it is a defence to prosecution for a master to rescue a person at sea in accordance with international obligations.²⁰¹

Copy of documents to be kept on board ship

25.9 Section 410 requires the master of an Australian ship to keep a copy of the Act on board the vessel, subject to a \$500 fine. While it may be desirable for a master and/or the crew to have access to their legal obligations in order to understand them, it is questionable if this requirement would satisfactorily fulfil this purpose.

25.10 The Act has not been reprinted since 1991 and has been significantly amended since that time. Much of the detailed requirements of regulations are now provided through Marine Orders, which also refer to the legal obligations of the master, offences and penalties set out in the Act. Modern legislation is now more readily available on the internet, either through legal databases or AMSA's website.

25.11 It would be more appropriate that ships' masters and crew have access to advice on their legal obligations through company manuals and training as part of the ship's safety management system. This aspect could be covered in the proposed new part of the Act dealing with the duties of persons involved with a ship.

²⁰⁰ The Act strengthens provisions in the *Customs Act 1901* and the *Migration Act 1958* concerning the interception and prevention of people smuggling operations. It also amends the *Migration Act 1958* and the *Fisheries Management Act 1991* to allow for the detention of foreign citizens arrested for illegal fishing activities in Australian waters.

²⁰¹ Submission No. 39

Recommendations

98. Section 101 concerning smuggling by a crew member should be repealed and these matters left subject to the *Customs Act 1901* and general company employment arrangements.

99. Section 104(1) dealing with the treatment of stowaways should be repealed. Stowaways who are not Australian citizens coming into Australia should be dealt with under the *Migration Act 1958*. Other stowaways should be treated as non-fare paying passengers.

100. The Migration Regulations should be amended to provide that it is a defence against prosecution for a master to rescue a person at sea in accordance with international obligations.

101. Section 410 requiring a master to keep a copy of the *Navigation Act 1912* aboard a ship should be repealed.

26. REPORTING REQUIREMENTS

26.1 Logbooks are a means of keeping accurate records and are admissible as evidence. It is important in investigating accidents and other matters for official purposes that the owner, master or crew maintain accurate records. Some records are required under international conventions. An official log remains a relevant requirement in modern shipping law, recording the information necessary to demonstrate compliance with and provide evidence of statutory requirements.

26.2 The *Navigation Act 1912* requires formal reporting by a ship's owner or master or others on a wide range of matters. Many of these matters must be reported in the official log or in another prescribed form. A summary of matters required to be officially reported under the *Navigation Act 1912* and Marine Orders is shown in Tables 23.1 and 23.2. Additional matters are required to be reported under related legislation, such as the *Occupational Health and Safety (Maritime Industry) Act 1993* and Protection of the Sea legislation.

26.3 Industry indicated that in some instances there is duplication of reporting requirements, both for the *Navigation Act 1912* and for other legislation or for company management purposes.²⁰² The requirement to use a prescribed form or to make separate handwritten entries in the official log means that extra time and costs are incurred. Rationalisation of reporting requirements is an area that offers substantial opportunity for businesses to reduce the costs of compliance with regulations, as well as in their own internal operations. This would meet one of the requirements of the review to reduce where feasible compliance costs and the paperwork burden on business.

26.4 Official reporting requirements should be grouped together under the general provisions of the proposed new Act concerning duties of persons aboard a ship. Reporting requirements should be examined to determine where they can be further rationalised, to be reported in a common form and using available technologies to consolidate and transmit the required information to the appropriate authorities.

26.5 The *Electronic Transactions Act 1999* provides that electronic communications can satisfy the requirements of Commonwealth law in relation to writing, signature, the production of original documents and the electronic retention of records. The intent is to remove legal obstacles that may prevent a person using electronic communications to satisfy obligations under Commonwealth law. Until July 1 2001, it will only apply to laws made subject to the Act by regulation. After that date Commonwealth laws may be exempted by regulation. The Australian Maritime Safety Authority therefore will be required from 1 July 2001 to facilitate transactions by electronic means, unless specifically exempted. Electronic transactions have the potential to significantly reduce the time and costs of data capture by using existing data bases to automatically fulfil multiple similar requirements.

26.6 AMSA already has introduced a revised reporting format in 1999 following a review of reporting requirements under the *Navigation Act 1912* and the *Occupational Health and Safety (Maritime Industry) Act 1993*. Two new forms (Forms 18 and 19)

²⁰² Industry workshops Perth 20 September 1999 and Sydney 22 September 1999

consolidated a number of different reporting requirements into a “one stop shop” reporting system for incidents and accidents. These forms are available on AMSA’s website or from AMSA offices, and can be lodged on a 24 hour basis by facsimile. The forms meet the reporting requirements of s107 of the *Occupational Health and Safety (Maritime Industry) Act 1993*, Regulation 4 of the Navigation (Marine Casualty) Regulations, ss268, 269 and 417 of the *Navigation Act 1912* and Marine Orders Part 32.²⁰³

26.7 Several of the matters required to be reported by a ship’s master under Marine Order 53 Employment of Crews, relate to seetime, discipline and fitness of seafarers. These requirements stemmed from the days of industry-wide pooled employment arrangements, where it was necessary for AMSA as administrator of the seafarers engagement system to be made aware of such matters. As these matters are now dealt with under company-based employment and disciplinary arrangements, there is no need to continue to report on them and relevant provisions should be repealed. Evidence of seafarers’ seetime for certification and qualification purposes can be met alternatively by a requirement for an employer to report under Marine Orders relating to qualifications.

26.8 In addition to the matters that were proposed for repeal under the Navigation Amendment (Employment of Seafarers) Bill 1998, other prescribed matters that could be repealed immediately include s116 inspection of bad provisions by superintendent, ss150-151 accounts of wages and effects of deceased seafarer, and s301 on examination of circumstances of a wreck. Provisions which could be combined in the proposed new legislation include s190A, s267D, s267S and MO19, which all deal with reporting of alteration or damage to a ship.

26.9 A number of provisions in the Act may coincide with operational records required for internal company management purposes. These include:

- s52 details of crew on board
- s168 new master to record list of ships’ documents
- s225 load lines details
- s231E records of radio log, including operations and maintenance
- s235 details of musters, drills and reasons for not holding drills or musters
- s236 conduct of equipment and machinery checks
- s269 report of accidents and incidents
- s269F-K reports of ship’s sailing plan and position.

26.10 In the review of Marine Orders, AMSA and the shipping industry should identify where scope exists for further rationalisation of official reporting requirements and the prescribed form of reporting. The objective should be to ensure that to the maximum extent possible the burden of reporting is kept to the minimum necessary consistent with the obligations under international conventions and the purposes of the legislation.

26.11 The reviews should also endeavour to identify areas where further scope exists for combining official reporting requirements with information needed for internal management purposes and for reporting this information in a common form. Industry

²⁰³ AMSA Marine Notice 6/1999.

should take the opportunity to review other reporting requirements which form part of their operational practices in routine shipping operations and identify where electronic transactions could embrace operational reporting matters in addition to mandatory requirements.

Recommendations

102. The Official Log should be retained, but all official reporting requirements should be grouped together under the general duties of persons aboard a ship.

103. The reporting requirements should be further examined by AMSA and industry to identify additional matters that can be rationalised into a common form and to allow use of available technologies to consolidate and transmit to the appropriate authorities.

104. Requirements to report on employment related matters that are no longer relevant under company based employment should be repealed.

Table 26.1: Matters required to be reported under the *Navigation Act 1912*

Section	Description	Comment
48	Conduct of persons unsuitable for employment	Repeal Stage 1
52	Owner or master to provide details of crew of a ship	Prescribed
71	Evidence of persons leaving ship	Repeal Stage 1
76	Account of wages on discharge	Prescribed; repeal Stage 1
116	Inspection by superintendent of bad provisions or water	OL; repeal
132B	Seaman left on shore to furnish address	Repeal Stage 1
148C	Master to account for wages and effects of seaman left behind	OL; Repeal Stage 1
150	Master to account for money and effects of deceased seaman	OL; repeal
151	Inform a proper authority of death of crew member	Retain; combine with s417
168	New master to enter list of documents handed over	OL; retain
190A	Notice of alteration of or damage to a ship	Retain; combine with ss267D and 267S
225	Load Lines details to be entered into log	OL; retain
231E	Keeping of radio log book and entry into official log of radio operations and maintenance	Prescribed, OL retain
235	Details of musters, drills and failure to hold drills	OL
236	Conduct of machinery and equipment checks	OL
265	Rendering assistance to ships in distress, distress signals received and reasons for not rendering assistance	OL
267D	Notice of alteration or damage to ship carrying oil	Prescribed; combine with ss190A and 267S
267S	Notice of alteration or damage to ship carrying noxious substances	Prescribed; combine with ss190 and 267D
268	Report of accidents and incidents	Prescribed; combine with ss269 and 417
269	Loss of ship and probable cause	Combine with ss269 and 417
269A	Dangers to navigation	Prescribed
269F	Sailing plan and position reports	Prescribed
269G	Cancellation of sailing plan	
269H	Position reports and deviations	Prescribed
269J	Leaving designated area and arrival at port	Prescribed
269K	Position reports for ship entering prescribed area	Prescribed
301	Examination of circumstances of wreck	Repeal
302	Notice of finding of wreck	Amend
417	Births, deaths, injuries or disappearances	OL; prescribed; combine with ss269 and 417

Notes:

OL	Required to be recorded in official log
Prescribed	Required to be reported in a prescribed form or to a prescribed person
Repeal Stage 1	Proposed for repeal under the Navigation Amendment (Employment of Seafarers) Bill 1998

Table 26.2: Matters required to be reported under Marine Orders

Marine Order	Description	Comment
MO10	Master to record loss or theft of drugs	OL; drug register
MO16	Entries on load lines	Prescribed; OL
MO19	Alteration to ship affecting tonnage	
MO21	Compass Deviation information	Prescribed
MO25	(a) Musters, abandon ship drill and fire drill etc; (b) information on passengers	(a) OL
MO26	Radio log book and entries in radio log book	Prescribed
MO27	Record in radio log of distress messages and all radiocommunications incidents related to safety	
MO28	Movements and activities affecting navigation of ship; all events related to main and auxiliary machinery; keeping of radio log	
MO29	Dangers to navigation and sending of safety and danger signals; checks and tests of steering gear and watertight doors;	OL
MO31	Alteration of or damage to a ship; accidents and incidents	Prescribed
MO 32	Injury or incidents while loading a ship; risks while loading; register of materials handling equipment	Prescribed
MO33	Notice of intention to load bulk grain; Notice of intention to sail after part discharge of bulk grain	Prescribed
MO34	Notice of intention to ship solid bulk cargo	
MO41	IMO Dangerous Goods Declaration and container/vehicle packing certificate	Prescribed
MO42	Notice of intent to ship abnormal or heavy cargo	
MO43	Notice of intention to load livestock	Prescribed
MO44	Report of examination of containers	
MO47	(a) Person assuming charge of MODU; (b) records of emergency drills and training; (c) proposed towage arrangements	logbook
MO53	(a) forms of agreement, details of crew, discharge of seafarers; wages; wages of deceased seafarers (b) Convictions, disciplinary matters, promotions, stowaways, accidents and incidents, code of conduct matters; (c) births, deaths and disappearances	(a) Prescribed (b) OL; prescribed (c) OL prescribed
MO54	Pilot to report deficiencies aboard ship	
MO56	Report of ship's position	Prescribed
MO91	Oil record books; notice of alteration or damage to ship carrying oil	Prescribed
MO93	Report of accident or defect in ship carrying noxious substances; alteration or damage to ship; noxious cargo record book; notification of import/export of liquid noxious substances	Prescribed
MO94	Pollution report	Prescribed
MO95	Garbage Record Book	Prescribed

Notes:

- OL Required to be recorded in official log
 Prescribed Required to be reported in a prescribed form
 Repeal Stage 1 Proposed for repeal under the Navigation Amendment (Employment of Seafarers) Bill 1998

27. COMPLIANCE AND ENFORCEMENT

27.1 An effective regulatory regime requires enforcement provisions that encourage participants in the industry to comply with the relevant legislative provisions and which deters or modifies behaviours that compromise the objectives of the legislation. Enforcement techniques can encompass penalties, including imprisonment, as well as educative actions to enhance awareness and knowledge where infringements may be less serious.

27.2 Effective enforcement therefore requires:

- Appointment of officials with appropriate powers to undertake inspections or audits to assess compliance with the law and to institute corrective actions;
- Legislated offences and penalties applied to those in a position to control actions or behaviours;
- Penalties sufficient to deter non-compliance or to encourage behaviour modification and with a sufficiently high maximum to allow a court to impose an adequate punishment for the worst possible case;
- A range of penalty actions proportional to the offence, ranging from infringement or advisory notices for minor offences or technical breaches of legislation, up to imprisonment for serious offences, such as those which may involve loss of life, serious injury or significant pollution.
- Appropriate provisions for court procedures, appeals and review processes.

Enforcement of International Convention Standards for Foreign Flag Vessels

27.3 The enforcement of safety and environment protection standards under international conventions primarily lies with the flag State when it becomes a party to the convention. The United Nations Law of the Sea Convention 1982 (UNCLOS) requires a flag State to undertake measures to ensure ships registered under its flag conform with generally accepted international safety standards. These measures include making regulations and conducting regular inspections to ensure standards are maintained in the construction, equipment, and seaworthiness of ships and also their manning, labour conditions, crew training and qualifications. UNCLOS also recognised a more limited role for a port State in investigating pollution involving a foreign flag ship on the high seas, or at the request of a flag State or the State affected by the pollution incident.

27.4 The role of the port State in enforcing international convention standards has become more important, particularly as some flag States have proved unwilling or unable to exercise the required degree of supervision over vessels registered under their flag. Unseaworthy and substandard ships have posed an unacceptable risk to the marine environment and safety of life and property, prompting many administrations, including Australia, to implement a strong port State control regime.

27.5 A number of international conventions recognise the right of port States to institute inspections of foreign flag ships when they are voluntarily visiting their ports:

- The SOLAS convention allows every ship in a port of a party to the convention to be subject to port State control aimed at verifying that the ship's certificates are valid and that the ship's safety management system is properly functioning. If the certificates are valid, they are to be accepted by the port State unless there are clear grounds for believing that the condition of the ship and its equipment does not correspond substantially with the details on its certificates. These grounds would include evidence that the ship, its equipment, or its crew does not correspond substantially with the requirements of relevant conventions or that the master or crew members are not familiar with essential shipboard procedures relating to safety of ships or the prevention of pollution.
- Under the STCW convention, the port State control inspection seeks to verify that all seafarers serving on the ship hold appropriate certificates of competency. It also checks that the numbers and certificates of seafarers are in conformity with the safe manning requirements of the flag State administration as shown on the ship's minimum manning document. An assessment also may be made of the ability of seafarers to maintain watchkeeping standards required by the STCW if there are clear grounds for believing the standards are not being maintained. These include the ship's involvement in an incident (collision, grounding or stranding), an illegal discharge of substances at anchor or at berth, the ship has been manoeuvred erratically or unsafely contrary to safe navigation practices, or operated in a manner posing a danger to life, property or the environment.
- MARPOL73/78 provides that a ship is required to hold a certificate in accordance with the convention and is subject to inspection while in a port or offshore terminal of another party to the convention. The inspection is limited to verifying that there is a valid certificate aboard unless there are clear grounds for believing the condition of the ship and its equipment does not correspond substantially to the certificate's details. The inspection may include examination of a ship's operational requirements where there are clear grounds for believing the master or crew are not familiar with essential shipboard procedures for prevention of pollution. Inspections also may verify if the ship has discharged any harmful substances in violation of the Convention or if another party to the Convention requests an investigation and provides sufficient evidence of the ship's discharge of a harmful substance.
- The Load Line Convention allows duly authorised officers of a contracting party to inspect ships of another party with a view to verifying that there is on board a valid International Load Line Certificate. Inspectors may determine whether the ship is loaded beyond the limits on the certificate, that the position of the load line on the ship corresponds to the certificate and the ship has not been materially altered so as to be manifestly unfit to go to sea without danger to human life.
- The Tonnage Convention allows for ships of a contracting party to be subject to inspections in the ports of another party for the purpose of verifying that the ship is provided with a valid International Tonnage Certificate. The inspection also ensures that the main characteristics of the ship correspond to the details on the certificate.

27.6 A port State also has a general right to exercise jurisdiction over foreign flagged vessels when they are voluntarily in a port of the port State, irrespective of whether the right is recognised in specific international conventions. This more general and powerful right exists by virtue of a coastal state's sovereignty over its internal waters. Ports and harbours are included as part of the coast for the purpose of determining territorial sea baselines under Article 11 of UNCLOS.

27.7 If a ship does not meet the requirements of the SOLAS, Load Line, MARPOL, or STCW conventions, such that it poses a danger to persons, property or the environment, a port State is allowed to take steps to ensure that the ship shall not sail until the situation is rectified. These conventions also require the port State to advise the relevant flag State if this gives rise to intervention of any kind by informing its Consul or nearest diplomatic representative. The port State also may advise the authorities at the ship's next port call if the ship is allowed to proceed on its voyage. Port States are required to make all possible efforts to avoid a ship being unduly detained or delayed and, if this does occur, they allow for compensation of any loss or damage suffered. The Tonnage Convention provides that in no case shall the exercise of inspection powers cause any delay to a ship, but the port State should inform the ship's flag State of an irregularity between the Tonnage Certificate and the ship's characteristics.

27.8 The *Navigation Act 1912* recognises these port State enforcement provisions in various sections. A number of provisions require the masters of all ships to produce relevant certificates before clearance is granted under the Customs Act 1901 for a voyage from any port in Australia.

- Section 206W requires production of SOLAS certificates and provides that the ship may be refused clearance and detained until the certificates are produced.
- Section 227A(3) requires production of a Load Line Certificate and allows for refusal of clearance and detention if not produced. Section 227B prohibits a ship going to sea that is overloaded and section 227C allows a ship to be detained if the ship is incorrectly marked in relation to its Load Line Certificate.
- Section 267J and 267X require production of the Ship Construction Certificate or a Chemical Tanker Construction Certificate respectively as prescribed by the MARPOL Convention.

27.9 There also are a number of provisions in the Act that prohibit any ship going to sea if certain requirements in relation to international convention standards are not met.

27.10 The provisions requiring production of certificates should be consolidated as far as practicable into a single provision concerning the duty of masters to produce relevant documents and certificates at the request of an authorised official.

AMSA Targeting of Ship Inspections

27.11 In administering the Port State Control program, AMSA sets target inspection levels for "eligible" foreign ships visiting Australian ports to identify those presenting a higher degree of risk in relation to safety and environment pollution. An "eligible"

ship is one that has not been inspected by AMSA during the last six months (three months for a passenger ship or a tanker over fifteen years old) immediately preceding the date of arrival at a port. AMSA also conducts a Flag State inspection program on Australian flag ships when they are in Australian ports along the same lines as Port State Control on foreign flag vessels.

27.12 The targeting system sets a minimum inspection level based on the type of ship and its age. A minimum inspection level of 85% is set for eligible tankers and bulk carriers over 16 years old, and all eligible passenger ships, and any type of ship on its first visit to Australia where no data is available to establish its target category. All other tankers and bulk carriers and eligible vessels over 10 years old have a minimum inspection level of 50% and for all other eligible vessels, the target is 15%.

27.13 AMSA is refining its targeting processes through the development of a Ship Inspection Decision Support System (SIDSS), aimed at improving the risk assessment of each ship. This system will take into account a wider range of factors including: the ship's flag, classification society, age, type of ship and its previous inspection performance record. Other factors also will be considered if relevant and if sufficient data is available, such as the history of particular shipowners, operators and charterers in relation to ship quality.

27.14 SIDSS will enhance AMSA's ability to monitor and assess the quality of ships visiting Australian ports and allow resources to be directed to the inspection of ships assessed as being in the higher risk categories. The system currently takes into account ship inspection data from New Zealand. Information on ship inspections in other countries in the region is being progressively added to the AMSA ship inspection database, in line with Australia's undertakings as a party to the Asia-Pacific and Indian Ocean Memoranda of Understanding on Port State Control.

27.15 AMSA also monitors the operation of tankers in Australian waters under its Tanker Safety Surveillance Program developed after consultation with the major shipping and oil industry interests. The program applies to tankers carrying crude oil or petroleum products, gas carriers and chemical tankers. The primary objective is to reduce the risk of pollution and fire, particularly during loading and unloading operations. This program also targets ships on the basis of ship type and its trade. Crude carriers and refined products tankers engaged in the international trade are inspected at their first port of loading or discharge on each visit to Australia. Tankers engaged in the Australian coastal trade are inspected about every three months.

27.16 AMSA is in the process of harmonising its Port State Control, Tanker Surveillance, and Flag State inspection programs into a single inspection program, with all ships being subjected to the same targeting and risk management decisions for inspection. Specialist ships (for example passenger ships and tankers) would be subject to additional inspection procedures specific to the risks they pose.

Appointment and Powers of Officials

27.17 Section 190 of the *Navigation Act 1912* provides for the appointment by AMSA of surveyors and lists the various types of skills required of such appointees. Section 190AA allows a surveyor to inspect a ship at any reasonable time and require

the master or any officer to produce certificates or other documents relating to the ship.

27.18 Surveyors also may be appointed as inspectors under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to inspect ships to ascertain compliance with that Act or, in the case of a foreign flag vessel, with the requirements of the MARPOL convention.

27.19 AMSA has the power under section 210 to order the detention of a ship that is unseaworthy or substandard. Section 207 defines a seaworthy ship as being “in a fit state as to the condition of its hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of crew including officers and in every respect, to encounter the ordinary perils of the voyage then entered upon” and it is not overloaded. A substandard ship may be seaworthy but conditions on board are clearly hazardous to safety or health.

27.20 Section 192A of the *Navigation Act 1912* provides that where a ship not registered in Australia is detained then AMSA should forthwith advise in writing the consul for the country where it is considered unseaworthy or substandard. This reflects the general principle that the flag state is primarily responsible for regulating the standards of a ship and should take necessary actions to ensure any deficiencies are addressed. A decision to detain a ship may be based upon a major deficiency that renders the ship unfit for its intended voyage or the cumulative effect of a number of deficiencies.

27.21 AMSA surveyors carry out inspections of ships, including foreign ships visiting Australian ports, to ensure they are seaworthy, do not pose a pollution risk, provide a safe and healthy work environment and comply with relevant international regulations. The surveyors are trained and conduct inspections in accordance with national and international guidelines. Surveyors are guided by “Instructions to Surveyors” based on regulations promulgated by the International Maritime Organization and the International Labour Organisation.

27.22 There are a number of search and entry powers within *the Navigation Act 1912* and Marine Orders which may not strictly comply with the contemporary Commonwealth’s Criminal Law Policy on Entry, Search and Seizure.²⁰⁴ The policy provides that Commonwealth legislation should only authorise entry into premises with the occupier’s consent, under warrant or under emergency circumstances. Search and entry of conveyances is an exception. Obtaining a warrant prior to entry to a vessel is impractical due to the inherent mobility of a ship.

27.23 Most entry and search provisions in the *Navigation Act 1912* conform to the exception provisions of the policy in that they do not require a warrant to enter and search a vessel. Other requirements concerning proof of identity on entry do not comply with the Criminal Law Policy. The policy requires that an authorised officer should be in possession of an identity card, incorporating a photograph, issued for that purpose. . It should be an offence for an officer to fail to return the card on ceasing to be an authorised officer. Section 413(b) of the Act provides for the Minister to authorise any person to enter and inspect any premises, which would include

²⁰⁴ Submission No. 44

company offices and other shore based facilities. There is no requirement for the person seeking entry to obtain a warrant or the consent of the owner of the premises, and this should be brought into line with the policy.

Offences and Penalties

27.24 The *Navigation Act 1912* and Marine Orders provide for a wide range of offences and significant penalties. A large proportion of offences relate to very similar matters and bear similar penalties, for example various provisions dealing with a ship not having a range of specified certificates. It is intended that these provisions should be rationalised and grouped around more general performance based requirements. Other recommendations of the review will require offence provisions of the Act to be revised to repeal redundant matters and to reflect the relevant directions outlined in this paper.

27.25 Many of the offence provisions do not reflect contemporary approaches to legislative drafting of such matters. Offence provisions should now be redrafted in the style required under the Criminal Code. For example, an offence of strict liability will need to specify that it is one of strict liability.

27.26 Many of the offences are drafted in a way that leaves it to a court to determine the relevant fault element, such as ss206H, 206S to 206V and 208. It is desirable that this uncertainty be removed, either by drafting offences to apply the default elements of the Criminal Code or specifying alternative fault elements.

27.27 All offences involving monetary penalties should be framed in terms of penalty units consistent with current Commonwealth criminal law policy. Section 4AA of the *Crimes Act 1914* currently provides that one penalty unit equals \$110 for an individual, which translates to \$550 for a body corporate. Expressing penalties in penalty units ensures that relativities across penalties can be maintained over time without the need for constant legislative amendments.

27.28 Section 4B(2) of the *Crimes Act 1914* provides that where a term of imprisonment is specified, an equivalent to monetary penalties can be calculated by the ratio of 5 penalty units for each month of imprisonment. Commonwealth criminal law policy indicates that the minimum term considered for imprisonment should be 6 months. Presently, penalties in the *Navigation Act 1912* do not meet these criteria, with significantly lower monetary equivalents to the prescribed maximum terms of imprisonment.

27.29 While traditional sanctions of penalties and prosecutions are essential to support enforcement of legislation if required, they often are not the most effective way to deal with non-compliance. Additional measures are desirable to broaden the suite of responses to non-compliance, depending on the severity of the problem.

27.30 Many regulatory systems reflect the imperfections of the real world where complete compliance is not and never will be achieved. The Office of Regulation Review noted²⁰⁵ that rigid enforcement of performance and prescriptive standards is unlikely to achieve optimum safety-cost efficiency outcomes, and that there is a need

²⁰⁵ ORR (1994) Compliance with the road transport law

for some discretion in enforcement to achieve optimum outcomes. Traditional deterrence systems (risk related inspection and fines) were considered to provide a means of achieving this goal if applied intelligently. Exclusionary standards (eg suspension or revocation of a licence to operate) are suitable for some offences, but may provide inappropriate disincentives for repeated low level breaches of some standards. The ORR also indicated it is desirable to coordinate regulations and penalties to provide appropriate signals about relative costs and risks of different actions.

27.31 The Act presently makes no provision for AMSA to issue infringement notices for minor defects or technical breaches of the law. AMSA's enforcement options are either to detain a ship, suspend a certificate or licence, or to prosecute breaches in the courts. These actions are relatively severe responses. In keeping with the principles of developing a safety culture, it is desirable that AMSA can bring minor deficiencies and unsafe practices to the attention of ship operators and crews, and work with them to remedy elements that might weaken the safety management system. This should involve a graduated range of responses, rather than relying solely on "heavy handed" prosecutions or detentions.

27.32 Another mechanism that may encourage compliance, where a breach is minor, non-critical or relates to an outcomes-based requirement, could be "enforceable voluntary undertakings". This mechanism would enable the relevant authority to address breaches of regulations by accepting binding undertakings from individuals or organisations, similar to those contained in the *Trade Practices Act 1974*. If undertakings are offered and given they would be capable of enforcement through the courts as breaches of undertakings rather than breaches of particular regulations. Courts would be empowered to make a range of orders against the individual or organisation, including that the undertaking be complied with or an amount of money be paid to the Commonwealth. Failure to comply would be a contempt of court. This mechanism is being proposed for inclusion in the *Civil Aviation Act 1988*. Experience in the ACCC and ASIC with enforceable voluntary undertakings is that they provide an effective means of changing culture and that the compliance rate is very high.²⁰⁶

27.33 The enforceable voluntary undertaking is generally only effective for Australian based operators, whereas most of Australia's compliance problems relate to foreign ships. Nevertheless, it offers another potential approach to encouraging compliance and acceptance of responsibility in some cases, particularly in relation to ISM and OH&S systems. It would be a complement to other compliance and enforcement mechanisms that would enable a wider range of responses to breaches.

27.34 It would also be desirable for AMSA to have the option of issuing summary penalty notices for some offences which may be more serious but there is no dispute about the offence. An example might be a watch keeper asleep on duty, leading to a minor grounding or similar incident. This option would provide greater flexibility, quick responses to negligence or blatant mistakes, and reduce high court costs and lengthy delays in bringing prosecutions.

27.35 For the more serious breaches, however, detention of a ship until deficiencies are rectified has proven to be a very effective mechanism to encourage a ship

²⁰⁶ Communication from AMSA Secretariat 5 June 2000

operator/owner to respond to deficiencies. The sanction is immediate and obvious, in terms of the direct costs to an operator of having a ship held idle. There is also the impact on the reputation of the ship operator in seeking new contracts for the ship, as information on detained vessels is now more widely shared among world safety administrations, charterers and cargo consignors.

Courts and Review

27.36 Part IXA of the Act provides for administrative review of decisions by the Administrative Appeals Tribunal (AAT). Matters currently subject to review are consistent with government guidelines for external review of decisions made under discretionary powers. It would be appropriate to maintain consistent review provisions for comparable decisions in any new legislation.

27.37 Part X of the *Navigation Act 1912* provides for a range of procedural matters for prosecutions and court proceedings relating to breaches of the Act. These provisions are necessary to the efficient functioning of prosecutions and court proceedings and should be retained in shipping law.

Recommendations

105. The legislation should continue to provide for the appointment of inspectors and for powers of inspectors to:

- (a) undertake audits of a company's safety management systems;
- (b) stop, board, inspect and search a ship;
- (c) muster the crew and ask questions; and
- (d) require production of all relevant documentation and certificates.

106. Provisions for regulating the manner of performance of duties by an inspector should be included in the legislation, consistent with Commonwealth criminal law policy and including relevant procedures for search and entry to premises and identification of authorised officers.

107. AMSA should continue to be enabled to delegate enforcement and inspection powers to other bodies as appropriate.

108. The legislation should provide for AMSA to:

- (a) issue defect notices or infringement notices for minor offences or deficiencies;
- (b) issue summary penalty notices for clear and undisputed offences;
- (c) accept binding undertakings from individuals and organisations;
- (d) order detention of a ship until deficiencies that adversely affect the seaworthiness of a ship are redressed, including where certificates are not all present and valid;
- (e) order a ship to proceed to a port, or not enter a port or specified waters, or to comply with specified requirements while in or near a port or specified waters, where AMSA has reason to believe a ship is not compliant with the regulations and it is necessary or expedient to ensure safety or to protect the environment;

- (f) undertake investigations, reviews and reports where AMSA has reason to believe that conditions aboard a ship may result in weakening of the ship's safety management system; and
 - (g) revoke, alter or suspend crew or ship certificates.
109. Ship and company management should be held liable for fines or imprisonment where a ship is unseaworthy or loss of life or serious personal injury are a direct consequence of management failing to take responsibility for safety.
110. Other penalties should apply to the person who can be proven to have had the requisite level of fault, including on-shore management and agents.
111. Where appropriate, there should be provision for monetary penalties to continue for every day that the offence continues.
112. Offences and penalties in the legislation should be rationalised and the amounts of penalties and equivalent terms of imprisonment should be revised consistent with the Criminal Code and the *Crimes Act 1914*. Penalties for individuals and bodies corporate should be separately specified and appropriate provision made for external review of decisions.
113. The legislation should continue to provide for efficient legal proceedings and administrative review of relevant decisions consistent with government guidelines for external review.

TERMS OF REFERENCE

The *Navigation Act 1912*, except for Part VI of the Act dealing with the coastal trade, is referred to a review team for evaluation and report by 1 July 2000. The review team is to focus on those parts of the legislation that restrict competition or trading opportunities, are anachronistic or redundant, or which impose costs or confer benefits on business. Part VI is excluded from the review as it has been the subject of a separate review process.

The review team will:

- identify the nature and magnitude of safety, environmental, economic and social issues that the *Navigation Act 1912* seeks to address;
- clarify the objectives of the Act and their appropriateness in terms of objectives for modern shipping regulation;
- identify the nature and extent of restrictions on competition contained in the Act;
- identify relevant alternatives to the Act including non-legislative approaches;
- analyse and, as far as practicable, quantify the benefits and costs and the overall effects of the Act and the alternative approaches identified above;
- identify the groups likely to be affected by the legislation and alternatives, list the groups and individuals consulted and outline their views; and
- make recommendations on preferred options for legislative or non-legislative measures to meet the identified objectives.

In assessing these matters and making recommendations, the review team will take into account:

- Australia's rights, obligations and duties under the UN Convention on the Law of the Sea and relevant conventions and resolutions of competent international organisations;
- the objective that regulation which restricts competition should be retained only if the benefits to the community as a whole outweigh the costs and where the objectives of the Act can only be achieved by restricting competition;
- any relevant effects on safety, the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business and efficient resource allocation; and
- the need to reduce where feasible compliance costs and the paperwork burden on business, particularly small business.

In undertaking the review, the review team is to advertise nationally the fact of the review, identify and seek submissions from interested parties likely to be affected by the Act, consult with key interest groups and affected parties and prepare a report for publication.

The review team will provide a progress report by 17 December 1999, with a final report to be presented by 1 July 2000. The review team will ensure that within 2 weeks of the report being finalised, it is forwarded to the Minister with a recommendation that the report be forwarded to the Treasurer to satisfy competition policy requirements.

APPENDIX A.2**PERSONS OR ORGANISATIONS WHO MADE SUBMISSIONS TO THE REVIEW**

Sub. No.	Person or Organisation	Date Received
1.	Mr Aubrey Wise, Panama Maritime Documentation Services	28/9/99
2.	Australian Transport Safety Bureau, Marine Incident Investigation Unit	30/9/99
3.	American Bureau of Shipping, Sydney	7/10/99
4.	International Association of Classification Societies Ltd	7/10/99
5.	Northern Territory Department of Transport and Works	11/10/99
6.	Mr Aubrey Wise, second submission	12/10/99
7.	Teekay Shipping (Aust.) Pty Ltd	13/10/99
8.	United Salvage Pty Ltd	13/10/99
9.	Australian Chamber of Shipping	13/10/99
10.	Dr Michael White, University of Queensland	14/10/99
11.	Liner Shipping Services Ltd	14/10/99
12.	Richard G.	15/10/99
13.	Australian Shipping Federation	15/10/99
14.	Apostleship of the Sea, Stella Maris Melbourne	15/10/99
15.	National Director – Australia, Stella Maris	15/10/99
16.	National Bulk Commodities Group & Minerals Council of Australia (joint submission)	15/10/99
17.	ASP Ship Management	19/10/99
18.	Waterways Authority NSW	20/10/99
19.	Maritime and Coastguard Agency, UK	20/10/99
20.	Environment Australia	21/10/99
21.	Association of Australian Ports and Marine Authorities Inc.	21/10/99
22.	Great Barrier Reef Marine Park Authority	22/10/99
23.	McCullough Robertson Lawyers	26/10/99
24.	Australian Federal Police	26/10/99
25.	Commonwealth Department of Health and Aged Care	27/10/99
26.	Maritime Safety Authority of New Zealand	1/11/99
27.	Australian Quarantine and Inspection Service	3/11/99
28.	Seafarers Safety, Rehabilitation and Compensation Authority	5/11/99
29.	Missions for Seamen Brisbane	9/11/99
30.	Australian Maritime College	9/11/99
31.	Maritime Union of Australia	9/11/99
32.	Environment Australia- second submission	10/11/99
33.	Australian Customs Service	10/11/99
34.	Cruising Down Under Inc.	12/11/99
35.	BHP Services	12/11/99
36.	Australian Petroleum Production and Exploration Association	12/11/99
37.	Queensland Transport	16/11/99
38.	Australian Mines and Minerals Association Inc	25/11/99
39.	Department of Immigration and Multicultural Affairs	26/11/99
40.	National Oil and Gas Safety Advisory Committee	1/12/99
41.	Reef Pilots Association	13/12/99
42.	Transport Canada	14/12/99
43.	Department of Employment, Workplace Relations and Small Business	22/12/99
44.	Attorney-General's Department	7/1/00

SUPPLEMENTARY SUBMISSIONS FOLLOWING SECOND ROUND CONSULTATIONS

Sub. No.	Person or Organisation	Date Received
45.	TT Line Coy Pty Ltd	7/3/2000
46.	Australian Hydrographic Office	21/3/2000
47.	Aubrey Wise, Marine Consultant	24/3/2000
48.	Australian Institute of Marine and Power Engineers	30/3/2000
49.	Liner Shipping Services	7/4/2000
50.	Great Barrier Reef Marine Park Authority	19/4/2000
51.	Department of Agriculture, Fisheries and Forests Australia	27/4/2000
52.	P&O Maritime Services	28/4/2000
53.	Australian Council of the Mission to Seafarers	28/4/2000
54.	UK Maritime and Coastguard Agency	28/4/2000
55.	Brambles Marine Group	1/5/2000
56.	BHP Transport and Logistics Pty Ltd	2/5/2000
57.	Australian Customs Service	2/5/2000
58.	Department of Health and Aged Care	2/5/2000
59.	Northern Territory Department of Transport and Works	2/5/2000
60.	Attorney-General's Department	3/5/2000
61.	Queensland Transport	3/5/2000
62.	National Marine Safety Committee	3/5/2000
63.	Australian Federal Police	5/5/2000
64.	Department of Industry Science and Resources	5/5/2000
65.	Victoria Department of Infrastructure	5/5/2000
66.	NSW Department of Transport	8/5/2000
67.	UK Secretary of State's Representative, Maritime Salvage and Intervention	10/5/2000
68.	Department of Defence, Defence Legal Office	11/5/2000
69.	Transport South Australia	11/5/2000
70.	Australian Petroleum Production and Exploration Association	15/5/2000
71.	TT Line	19/5/2000
72.	Seafarer's Safety, Rehabilitation and Compensation Authority	24/5/2000
73.	Heritage South Australia	24/5/2000
74.	Maritime Union of Australia	29/5/2000

APPENDIX A.3

DEVELOPMENT OF THE NAVIGATION ACT 1912

The *Navigation Act 1912* has its origins in 19th century British shipping legislation, which it replaced in Australia following Federation. The British *Merchant Shipping Act 1854* and the subsequent *Merchant Shipping Act 1894* embodied most of the then British law affecting shipping. These laws covered a range of welfare and safety measures appropriate to the times to address the generally poor working conditions of seafarers at that time and a high loss rate of both ships and lives.

Matters covered in these British Acts included:

- Powers of officials to board, inspect premises and documents, inspect the ship's hull and machinery, summons persons, and investigate accidents;
- Registration and tonnage measurement;
- Employment and welfare of seamen, desertion, discipline and mutiny;
- Safety and prevention of accidents, including lifesaving appliances and survey;
- Offences by passengers and reporting of accidents or incidents;
- Pilotage;
- Lighthouses;
- Wrecks and salvage;
- Shipowners' liability;
- Legal procedures;
- Collision regulations;
- Unseaworthiness and the power of detention;
- Load lines
- Carriage of dangerous goods.

Other than pilotage and lighthouses, the *Navigation Act 1912* broadly continued these provisions.

Shipping was considered a priority for regulation by the nascent Australian nation. Drafting of the *Navigation Act 1912* commenced in 1902 and the first Bill was introduced in 1904, but was withdrawn and a Royal Commission was appointed to examine the legislation. The report of the Royal Commission was delivered in 1906, but the matter of Australian legislation was again delayed pending the outcome of an Imperial Shipping Conference of Australia, New Zealand and the UK in London. The conference discussed the substance of the proposed Act.

The conference resulted in agreement that Australia should have the right to regulate its own coastal trade, and relevant provisions were included in the draft legislation. Also included were provisions extending limited port state control functions over foreign ships to include load lines, life saving equipment, carriage of grain and defective equipment.

A redrafted Bill was again introduced in 1907 but lapsed. Further attempts were made in 1908, 1910 and 1911 and the Bill was ultimately passed in 1912. It was then referred to the King for Royal Assent, but by the time this had been granted war had

broken out and, at the request of the British Government, the commencement of the Act was postponed.

Accordingly, none of the Act came into force until after the First World War. The first group of sections, including those dealing with coastal trade, welfare and employment matters, came into effect in 1921. At the time of its introduction, there were two main purposes of the legislation. The first was to provide seamen with protection from unscrupulous employers who might seek to take advantage of seamen who were illiterate and incapable of protecting themselves. The second was to implement safety measures to halt the steep rise in the rate of shipping casualties.²⁰⁷

Shortly after proclamation, a number of owners operating intrastate ships tested the validity of the manning and accommodation provisions and the High Court decided that the provisions did not apply to vessels solely engaged in the domestic trade of a State. In consequence the Government decided not to enforce the provisions of the Act on any intra-state ships.²⁰⁸

Another Royal Commission was conducted in 1924, to assess the effect of the Act on trade, industry and development in Australia. The Commission examined some of the reasons for introduction of the Act, viz the need to protect Australian coastal shipping from unfair competition from foreign ships, to ensure a supply of merchant ships and trained seamen in the event of war, and to secure communications and trade. The Commission found that, despite the Act, an Australian Merchant Marine did not exist and was unlikely to come into effect as a result of the Act. It further found that the operation of the Act tended to act against small ship operations in the interstate trades, with negative effects on certain industries in the smaller States. The Commission recommended repeal of Part VI.²⁰⁹ However, a minority report held that the causes of trading difficulties were unrelated to the Act, and the only problem was unsympathetic administration by senior officials.²¹⁰ In the event Part VI was retained.

Since its enactment, there have been over 70 laws making amendments to the Act, around 50 of which have been in the last 20 years. Some of the most significant amendments were:

- Incorporation of international safety conventions for the first time in 1934 (SOLAS 1929 and Load Lines 1930);
- A major revision in 1958, in which a large number of redundant provisions, including those that never entered into force, were repealed;
- Fundamental changes in 1979 and 1980 to implement revised jurisdiction arrangements under the Offshore Constitutional Settlement;
- repeal of the 1931 British Commonwealth Merchant Shipping Agreement and removal of references to and preferences for British ships and Commonwealth countries;
- implementation of a range of international conventions, including containers, collisions, SOLAS 74/78, limitation of liability, and tonnage measurement;
- introduction of ship movement reporting;

²⁰⁷ Commission of Inquiry into the Maritime Industry (1976)

²⁰⁸ Parliament of the Commonwealth of Australia (1924), p2

²⁰⁹ *ibid*, p3.

²¹⁰ *Ibid*, p65.

- revised arrangements for ship manning and crew qualifications, requiring regulations on these matters to be in the interests of safety or protection of the marine environment;
- removal of historic shipwrecks from the wreck and salvage provisions;
- provision for the Minister to make Marine Orders as an alternative to regulations;
- provision to gazette the Uniform Shipping Laws Code; and
- provision for administrative review of decisions by the AAT rather than Courts of Marine Enquiry.

Several of these amendments reflected the Commonwealth's response to the findings of the High Court in the seas and submerged lands case, as well as the recommendations of the 1976 review of the Commonwealth's maritime legislation (the Summers report).²¹¹

A further series of legislative amendments was undertaken in the 1980s and early 1990s, the key features of which included:

- removal of pollution and civil liability matters from the Act and their inclusion in separate legislation;
- adoption of the 1989 Salvage Convention;
- creation of the Australian Maritime Safety Authority (AMSA) as a statutory body, under separate legislation, to administer the Act, other than the coastal trading provisions in Part VI, and devolution to the Authority of many of the decision and rule making powers of the Act.

In 1997 the Shipping Reform Group recommended the introduction of company based employment in the Australian shipping industry. Under company employment, the terms and conditions applying to seafarers are a matter for negotiation between employers and seafarers, with legislative backing provided under community wide legislation. The Shipping Reform Group considered the positive outcomes from company employment to be improved relations between employer and employees, forging of enterprise cultures, more efficient introduction of quality management systems and more effective planning of crew requirements.²¹²

A Bill to repeal a wide range of matters relating to seafarer employment was introduced in 1998. This Bill²¹³ seeks to repeal a range of matters in the *Navigation Act 1912* that were considered to be inconsistent with general employment legislation (the *Workplace Relations Act 1996*) and/or contrary to the concept of company based employment. This followed the withdrawal of the Australian Maritime Safety Authority from the pooled labour system, the Seafarers Engagement System²¹⁴, and negotiations between the shipping industry and the unions for the transition to company based employment for all seafarers from 1 July 1998. The principal matters proposed for repeal in this Bill are:

- provisions for engagement and discharge of seafarers from individual ships;
- provisions for how wages are to be paid to seafarers;

²¹¹ Commission of Inquiry into the Maritime Industry (1976)

²¹² Shipping Reform Group (1997), known as the Manser Report.

²¹³ Navigation Amendment (Employment of Seafarers) Bill 1998

²¹⁴ The Seafarers Engagement System was established under a schedule to the Maritime Industry Seagoing Award which was removed in 1998. It was not a requirement of the *Navigation Act 1912*.

- an industry wide arrangement through the Marine Council for assessing the suitability of individual seafarers for employment in the industry;
- prohibitions on demanding or receiving fees for the supply of seamen;
- prohibition on using the crew for handling cargo or ballast while in port;
- sick leave entitlements; and
- requirements for a prescribed form of articles of agreement.

On 8 March 2000, the Senate proposed wide ranging amendments to the Bill, effectively removing all of the above provisions except those dealing with payment of wages. At the time of preparing this report, the Government has not determined its response to the proposed amendments.

MARINE ORDERS REVIEW CHECKLIST

In assessing Marine Orders, the following tests of essentiality will be applied:

- Which objective(s) of the legislation does the Marine Order relate to?
- What social, environmental or economic issue(s) does the Marine Order address?
- Does the Marine Order impose a restriction on competition, if so what is the nature of that restriction, its costs/benefits and for which markets? Is it justified?
- Is the Marine Order highly prescriptive, or does it allow flexibility on how the intent of the Marine Order could be met, eg performance standards?
- Is the Marine Order applying an internationally agreed standard/code or does it go beyond the international standard/code?
- If there is no relevant international standard/code, or if the MO goes beyond an international standard/code, what is the justification for this form of regulation (eg agreement with industry or developed in consultation with the States for consistency)?
- Is there or could there be an alternative industry based code of practice or other mechanism? Why is this approach not used?
- Can reporting requirements be reduced or rationalised with information required for other purposes?

Abbreviations

AAT	Administrative Appeals Tribunal
AMSA	Australian Maritime Safety Authority
ASF	Australian Shipping Federation
ATC	Australian Transport Council
ATSB	Australian Transport Safety Bureau
AusSAR	Australian Search and Rescue Centre
COAG	Council of Australian Governments
COLREGS	Convention on International Regulations for Preventing Collisions at Sea 1972
COSOP	Committee on Safety in the Offshore Petroleum Industry
DEWRSB	Department of Employment, Workplace Relations and Small Business
DIMA	Department of Immigration and Multicultural Affairs
DISR	Department of Industry, Science and Resources
DTRS	Department of Transport and Regional Services
EEZ	Exclusive Economic Zone
FPSO	Floating Production, Storage and Offloading (facility)
GBRMPA	Great Barrier Reef Marine Park Authority
GPS	Global Positioning System
GT	Gross Tonnage
HNS	Hazardous and Noxious Substances
IACS	International Association of Classification Societies
IAP	Industry Advisory Panel
ILO	International Labour Organization
IMDG	International Maritime Dangerous Goods Code
IMO	International Maritime Organization
ISM	International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention
LLC	International Convention on Load Lines 1966
MARPOL	International Convention for the Prevention of Pollution from Ships 1973 and Protocol of 1978
MCA	Minerals Council of Australia
MIIU	Marine Incident Investigation Unit
MPG	Marine and Ports Group
MO	Marine Order
MODU	Mobile Offshore Drilling Unit
MUA	Maritime Union of Australia
NBCG	National Bulk Commodities Group
nm	nautical mile
NMSC	National Marine Safety Committee
NOGSAC	National Oil and Gas Safety Advisory Committee
NSCV	National Standards for Commercial Vessels (draft)
OECD	Organisation for Economic Cooperation and Development
OCS	Offshore Constitutional Settlement 1979
ORR	Office of Regulation Review
P&I	Protection and Indemnity (Club)
PSLA	Petroleum (Submerged Lands) Act 1967
SOLAS	International Convention for the Safety of Life at Sea 1974
SSLA	Seas and Submerged Lands Act 1973
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 and 1995 Revision
SVP	Single Voyage Permit
UNCLOS	United Nations Convention on the Law of the Sea 1982
USL	Uniform Shipping Laws (Code)

Bibliography

- Aberdeen University/AURIS Ltd. (1999) UK Safety Case Evaluation report
- Access Economics (1999) Economic Contribution of the Australian Shipping Industry
- Apelbaum Consulting Group Pty Ltd (1999) Australian Maritime Transport 1998
- Attorney-General's Department (1980) Offshore Constitutional Settlement - A Milestone in Co-operative Federalism, AGPS, Canberra
- Australian Maritime College (1994) In Search of a Comprehensive Australian Shipping Policy, Proceedings of the Aus-Ship 94 Seminar, Launceston
- Australian Maritime Safety Authority (1993) Review of the National Plan to Combat Pollution of the Sea by Oil, AGPS, Canberra
- Australian Maritime Safety Authority (1995) Implementation of the International Maritime Safety Management (ISM) Code
- Australian Maritime Safety Authority (1997) A Survey of the Health, Stress And Fatigue Of Australian Seafarers
- Australian Maritime Safety Authority (1998) The Future Direction of Regulatory Control
- Australian Maritime Safety Authority (1999a) Port State Control Manual
- Australian Maritime Safety Authority (1999b) Annual Report 1998-99
- Australian Maritime Safety Authority (various years) Port State Control Annual Report
- Australian National Maritime Association (1989) Australian Shipping – Structure, History and Future, ANMA, Melbourne
- Bach, J (1976) A Maritime History of Australia, Pan Books, Sydney
- Bernaerts, A (1988) Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea, Fairplay Publications Ltd, Surrey
- Boisson, P (1999) Safety at Sea – Policies, Regulations and International Law, Bureau Veritas, Paris
- Bureau of Industry Economics (1995) International Performance Indicators: Coastal Shipping 1995, Research Report No. 68, AGPS, Canberra
- Bureau of Transport and Communications Economics (1991) Major Marine Oil Spills - Risks and Response, AGPS, Canberra
- Butler, DA and Duncan, WD (1992) Maritime Law in Australia, Legal Books, Sydney
- Canada, Minister for Transport (1998) Bill C-15 – Canada Shipping Act
- Commission of Inquiry into the Maritime Industry (1976) Report on Australian Maritime Legislation, AGPS, Canberra
- Committee on Oil Spill Risks from Tank Vessel Lightering (1998) Oil Spill Risks from Tank Vessel Lightering, National Academy Press, Washington DC

Commonwealth of Australia (1992) *Ships of Shame*, Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure Inquiry Into Ship Safety, AGPS, Canberra

Commonwealth of Australia (1995) *Ships of Shame - A Sequel*, Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, AGPS, Canberra

Consultative Committee on Safety in the Offshore Petroleum Industry (1991) Report to the Minister for Resources

Council of Australian Governments (1997a) Inter-Governmental Agreement for a National Marine Safety Regulatory Regime

Council of Australian Governments (1997b) Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies

Couper A.D., Walsh C.J., Stanberry B.A., & Boerne G.L. (1999) *Voyages of Abuse – Seafarers, Human Rights and International Shipping*, Pluto Press, London

Crone, P. (1994) Review of Coastal Pilotage Regulations, AMSA, Canberra

Cutter Information Corp (1994) *The Financial Costs of Oil Spills*, Oil Spill Intelligence Report, Arlington

Davies, M and Dickey, A (1990) *Shipping Law*, The Law Book Company Ltd, Sydney

Department of Employment, Workplace Relations and Small Business (1998) *Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping Trade*

Department of Foreign Affairs and Trade (1994) United Nations Convention on the Law of the Sea 1982, Australian Treaty Series No. 31, Canberra

Department of Infrastructure, Victoria (1998) *Competition Review of the Marine Act 1988 - Discussion Paper*, DOI, Melbourne

Department of Trade & Department of Transport (1984) *Report of the Joint Shipping Task Force*

Department of Transport (1995) *Great Barrier Reef Shipping Study*, Vols I and II, Department of Transport, Canberra

Department of Transport and Regional Development, Bureau of Transport and Communications Economics & Australian Maritime Safety Authority (1997) *Review of the Australian Maritime Safety Authority Act 1990*

Department of Transport and Regional Services (1999) *Issues Paper – Review of the Navigation Act 1912*, DTRS, Canberra

Department of Transport and Regional Services and the Australian Maritime Safety Authority (2000) *Review of the Navigation Act 1912 – Directions Paper*

Department of Workplace Relations and Small Business & Australian Maritime Safety Authority (1997) *Review of the Shipping Registration Act 1989*

Donaldson (1994) *Safer Ships, Cleaner Seas*, Report of Inquiry into the Prevention of Pollution from Merchant Shipping, HMSO, London

Drewry Shipping Consultants Ltd (1998) *Cost of Quality in Shipping – The Financial Implications of the Current Regulatory Environment*, Drewry, London

Economic and Social Commission for Asia and the Pacific (1984) Guidelines for Maritime Legislation, United Nations, New York

Economic and Social Commission for Asia and the Pacific (1991) Guidelines for Maritime Industry Labour Legislation, United Nations, New York

Finnestad, OB; Ognedal M and Spence E (2000) Report of the Independent Review Team, Australian Offshore Petroleum Safety Case Review, DISR, Canberra

Hawkins, J (1999) Safer Shipping in the Asia Pacific Region Project, (Phase 1), Final report, APEC Secretariat

Hilmer F, Raynor M, and Taperell G (1993) National Competition Policy, AGPS, Canberra

House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform (1998) Ship Safe - An Inquiry into the Australian Maritime Safety Authority Annual Report 1996-97, Commonwealth of Australia, Canberra

International Maritime Organisation (1999a) Tokyo Memorandum of Understanding Port State Control Manual

International Maritime Organisation (1999b) Paris Memorandum of Understanding Port State Control Manual

International Maritime Organisation (1997) Guidelines to Assist Flag States in the Implementation of IMO Instruments, Resolution A.847(20)

International Oil Pollution Compensation Fund (1999a) Record of Decisions of the Fourth Session of the Executive Committee, 92FUND/EXC.4/11

International Oil Pollution Compensation Fund (1999b) Record of Decisions of the Fifth Session of the Executive Committee, 92FUND/EXC.5/2

International Oil Pollution Compensation Fund (1999c) Annual Report 1999

Marine Incident Investigation Unit (1998) Marine Incident Investigation Unit Review 1996-97

Maritime Industry Development Committee (1986) Moving Ahead, AGPS, Canberra

Minister for Workplace Relations and Small Business (1997) Statement on Waterfront and Maritime Reform, Media Release 18 December 1997

National Marine Safety Committee (1999) National Standard for Commercial Vessels (Draft)

New Zealand Maritime Transport (1992) Review of the Shipping and Seamen Act 1952, Discussion Paper

New Zealand Maritime Safety Authority (1994a) Maritime Transport Act 1994 – Your guide to the Legislation

New Zealand Maritime Safety Authority (1994b) The Rules Process for Maritime Transport, pamphlet

Ngantcha, F (1990) The Right of Innocent Passage and the Evolution of the International Law of the Sea, Pinter Publishers, London

OECD (1996) Competitive Advantages Obtained by some Shipowners as a Result of Non-observance of International Rules and Standards, OECD/GD(96)4

OECD (1998) Possible Actions to Combat Substandard Shipping by Involving Players other than Shipowners in the Shipping Market, DSTI/DOT/MTC/GWP(98)1

OECD (1999) Discussion Document on Regulatory Reform in International Maritime Transport, DSTI/DOT/MTC(99)8

Office of Regulation Review (1998) A Guide to Regulation, Second Edition

Office of Regulation Review (1995) The Analysis and Regulation of Safety Risk – A Survey of Practices of National and Commonwealth Agencies, ORR, Canberra

Office of Regulation Review (1994) Compliance with the Road Transport Law – A Submission to the National Road Transport Commission, ORR, Canberra

Pamborides, G P (1999) International Shipping Law – Legislation and Enforcement, Kluwer Law International, Ant. Sakkoulas Publishers, Athens

Parliament of the Commonwealth of Australia (1924) Report of the Royal Commission on the Navigation Act, Government Printer, Melbourne

Petroleum (Submerged Lands) Review Committee (2000) National Competition Policy Review of the Petroleum (Submerged Lands) Legislation, Exposure Draft, Department of Industry, Science and Resources, Canberra

Prices Surveillance Authority (1993) Inquiry into Pilotage Services on the Great Barrier Reef, Report No. 50

Productivity Commission (1999) Review of International Air Service Agreements

Savage, I (1999) The Economics of Commercial Transportation Safety, in Essays in Transportation Economics and Policy, Gomez-Ibanez, Tye and Winston (eds), Brookings Institution Press, Washington DC

Senate Environment, Recreation, Communications and the Arts Reference Committee (1997), Inquiry on Marine Pollution, Senate Printing Unit, Parliament House, Canberra.

Shipping Industry Reform Authority (1992a) Shipping Reform - Past, Present, Future, SIRA, Canberra

Shipping Industry Reform Authority (1992b) Future Shipping Reform, SIRA, Canberra

Shipping Reform Group (1997) A Framework for Reform of Australian Shipping, Department of Transport, Canberra

Shipping Reform Working Group (1999) Report, Department of Transport and Regional Services, Canberra

Smith, J. (1999) Ship Safety and Pollution Prevention: The Regulatory Regime, International Association of Classification Societies Ltd, London

Thompson Clarke Shipping Pty Ltd (1995) Review of Maritime Safety Arrangements in Australia, Phase 1

Thompson Clarke Shipping Pty Ltd (1998) Review of Regulatory Responsibility for Australian and Foreign Flag Trading Ships on the Australian Coast

Thompson Clarke Shipping Pty Ltd (1999) Shipping Industry in Australia – A Report on the Maritime Skills Base in Australia

Transport Canada (1999) Marine Safety – Inspectors' Enforcement and Compliance Manual (Discussion Draft)

Transport Canada (1998a) Canada Shipping Act Reform – Proposals for a new CSA Part on Personnel, Draft Document

Transport Canada (1998b) Canada Shipping Act Reform – New Part: Seaworthiness and Inspections, Discussion Paper

Transport South Australia (1998) Competition Policy Review of the South Australian Harbours and Navigation Act 1993, Discussion Paper

Treasurer (1996) Commonwealth Legislation Review Schedule, Press Release No. 40, 28 June 1996

United Kingdom, Department of Transport (1990) British Shipping: Challenges and Opportunities, HMSO, London

United Nations Conference on Trade and Development (1998) Review of Maritime Transport 1998, UNCTAD/RMT(98)/1, Geneva